No. 97-6203-CFY Title: Nathaniel Jones, Petitioner
v.
United States

Docketed: September 29, 1997 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Sep 25 1997	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 19, 1997)
	Oct 6 1997	Waiver of right of respondent United States to respond filed.
	Oct 9 1997	DISTRIBUTED. October 31, 1997
	Oct 20 1997	Response requested.
	Nov 17 1997	Order extending time to file response to petition until December 19, 1997.
	Dec 18 1997	Brief of respondent United States in opposition filed.
	Dec 31 1997	REDISTRIBUTED. January 16, 1998
	Mar 25 1998	REDISTRIBUTED. March 27, 1998
	Mar 30 1998	Petition GRANTED. SET FOR ARGUMENT October 5, 1998. **********
	Apr 6 1998	The order entered March 30, 1998, granting a writ of certiorari is amended as follows: The writ of ceriorari is limited to the following questions: 1. Does 18 U.S.C. Sec. 2119(1)-(3) describe sentencing factors or elements of the offense? 2. If 18 U.S.C. Sec. 2119(1)-(3) sets forth sentencing factors, is the statute constitutional?
	Apr 24 1998	Order extending time to file brief of petitioner on the merits until June 4, 1998.
	May 1 1998	Joint appendix filed.
	Jun 3 1998	Brief of petitioner Nathaniel Jones filed.
	Jun 4 1998	Order extending time to file brief of petitioner on the merits until June 12, 1998.
	Jun 12 1998	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Jun 30 1998	Order extending time to file brief of respondent on the merits until July 20, 1998.
	Jul 20 1998	Brief of respondent United States filed.
	Jul 31 1998	CIRCULATED.
	Aug 5 1998	Record filed.
	Aug 17 1998	Record filed.
	Aug 18 1998	Reply brief of petitioner Nathaniel Jones (PRINTED) filed.
	Oct 5 1998	ARGUED.

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97-6203

Supreme Court, U.S.
FILED
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No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NATHANIEL JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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49 pp

97-6203
Jones
v.
United States

QUESTIONS PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals violate petitioner's right to due process by sentencing him to a maximum term when he had no notice that he was facing such a term?

Was conduct attributed to petitioner in the trial sufficient evidence of a substantial effect on interstate commerce such that it would invoke Congress' authority under the Commerce Clause?

Did petitioner's conviction violate the Fifth Amendment prohibition against double jeopardy?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NATHANIEL JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

Nathaniel Jones respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered filed on June 27, 1997.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit was filed on June 27, 1997. The opinion affirmed the resentencing imposed by the district court. A copy of the opinion is attached to this petition as Appendix A.

The petitioner initially appealed his conviction and sentence to the Ninth Circuit upon conviction by jury. A copy of the Ninth Circuit published opinion, *United States v. Oliver*, 60 F.3d 547 (Ninth Cir. 1995), which affirmed in part and reversed in part, is attached to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the NInth Circuit was entered on June 27, 1997. This petition for writ of certiorari follows within ninety days. 28 U.S.C. § 2101(c) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules 13.1 and 13.4.

PROVISIONS OF LAW INVOLVED

1. Carjacking, 18 U.S.C. § 2119, provided in pertinent part (1992):

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall -
>
> > (1) be fined under this title or imprisoned not more than 15 years, or both,

2. 18 U.S.C. § 924(c)(1) sets forth:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which the provides for an enhanced punishment if committed by the use of a deadly

> or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shogun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, each person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

3. CONSTITUTION OF THE UNITED STATES, ARTICLE [I] § 8, cl. 3, provides:

> The Congress shall have Power...
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

4. CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

1. PROCEDURAL BACKGROUND

Nathaniel Jones was charged with Carjacking, in violation of 18 U.S.C. § 2119, and Use of a Firearm During and In Relation to a Crime of Violence, in violation of 18 U.S.C. § 924 (c)(1). Jury trial was held July 27, 28, and 29, 1993. On July 29, 1993, Jones was found guilty of counts one and two of the indictment. On December 13, 1993, Jones was sentenced to a total term of imprisonment of 360 months. An appeal of the conviction and sentence was filed. In a published decision, *United States v. Oliver*, 60 F.3rd 547 (Ninth Cir. 1995), the Ninth Circuit affirmed the judgment of conviction. The sentence was vacated and the cause remanded for resentencing by the district court.

Upon resentencing, the court imposed a term of imprisonment of 240 months on count one and a term of sixty months on count two, to run consecutively.

An appeal was taken from this sentencing based on an improper upward departure by the district court. In a memorandum decision, the Ninth Circuit affirmed the conviction and sentence on June 27, 1997.

2. FACTUAL BACKGROUND

On December 7, 1992, petitioners Nathaniel Jones, Donovan Oliver (Oliver), and Darryl McMillan (McMillan) met at a get-together in Bakersfield. At about 9:45 p.m. they left together to get something to drink. The three men got into a blue Cadillac which Jones was driving. Shortly thereafter, McMillan and Jones exchanged seats so that

McMillan could drive as Jones was drunk and the car was swerving. A gun was in the backseat.

When the men arrived at Nagi Liquors, they pulled to the curb on the street near the side of the store and parked. Jones and Oliver exited the car. Ali Nassar Mutanna (Mutanna) and Abdullah Mardaie (Mardaie), Bakersfield residents, were parked in Mutanna's tan Honda also near the side of the store. The engine was running as they were speaking to a friend.

Mutanna saw two individuals exit the blue Cadillac and come towards him. One of them, later identified as Oliver, had a gun. Mutanna testified he was directed to exit the car, was pulled behind the store where Oliver held the gun on him and was robbed. Oliver directed Mutanna to lie down on the ground who then proceeded to kick and hit him. Jones was not in the area when this occurred. Immediately after this happened, Oliver left. Mutanna looked up from his prone position and saw Oliver get into the back seat of the Cadillac. Oliver fired a shot and the Cadillac drove off. As the Cadillac left only two individuals were in it -- the driver and Oliver in the backseat. At trial, Mutanna identified the driver as petitioner McMillan. Mutanna subsequently saw his tan Honda being driven away.

While Mutanna was behind the liquor store, Mardaie was still inside the tan Honda. He was directed outside by one of the men, robbed and told to get back in the car. He was in the car when the shot was fired.

After the Cadillac drove away, Jones got into the tan Honda and drove away. As Mardaie was still in the car, they traveled only a short distance, and Jones told him to leave the car which he did. Jones drove the vehicle away from Nagi's Liquors.

Mutanna flagged down a police officer and got in the backseat of the patrol vehicle. He directed the officers in the direction he saw the Jones travel. Blocks away Mutanna saw his tan Honda near the curb. He pointed this out to the officers, exited the patrol car, and the police then followed Jones who was still in the Honda. Jones made two right turns and hit a telephone pole where the car came to rest. He was arrested.

After a search of the surrounding area, police found the blue Cadillac parked at the curb of the street. An inventory search of the Cadillac yielded the gun used by Oliver. Oliver and McMillan were arrested nearby.

REASONS FOR GRANTING THE PETITION AND ISSUING A WRIT OF CERTIORARI

1. INTRODUCTION.

This court should grant review because the Court of Appeal's affirmance of the petitioner's conviction for carjacking on these facts would invalidate 18 U.S.C. § 2119 as the statute would have been enacted in excess of Congress' power to legislate under the Commerce Clause. The ruling by the Court of Appeals should be reviewed because it conflicts with this court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995).

Further, this court should grant review because the decision of the court of appeal is in violation of the Fifth Amendment prohibition against double jeopardy as well as a violation of petitioner's due process rights.

THE FAILURE BY THE GOVERNMENT TO PLEAD AND PROVE THE ALLEGATIONS OF SERIOUS BODILY INJURY VIOLATED PETITIONER'S RIGHT TO DUE PROCESS

The Due Process Clause of the Fourteenth Amendment requires that an individual accused may only be convicted upon proof beyond a reasonable doubt of each and every fact necessary to constitute the crime with which he is charged. *In Re Winship*, 397 U.S. 358, 90 S.Ct 1068 (1970) Elements are those items included in the definition of the offense. Whether or not a particular factor is an element of the offense charged or is instead only a sentencing provision is determined by looking at the statute itself. In interpreting the substantive ambit of criminal prohibitions, ambiguities must be resolved in favor of the criminal petitioner. *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198 (1979)

In late 1992, Congress enacted legislation making carjacking a federal offense by adding Section 2119 to the Title 18 of the United States Code. This provides in relevant part that,

"whoever, possessing a firearm ..., takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, ...

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both.

(3) if death results, be fined under this Title or imprisoned for any number of years up to life, or both.

The provisions of the carjacking statute provide for different maximum penalties and each has an additional element which must be proved by the prosecution. In a case where serious bodily injury is caused in the commission of a carjacking as set forth in section 2119 (2), the sentence maximum is 25 years, ten years more than the maximum for a carjacking without such injury. The injury which occurs as a result of the carjacking must be alleged and proven at trial in order for the 25 year maximum to apply. The injury includes: (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. 18 U.S.C. § 1365 (g)(3).

Serious bodily injury is an element of the offense stated in section 2119(2). The fact of serious bodily injury increases the maximum penalty available for the crime by ten years. As an element, it must be pleaded and proven and the jury must make a determination that the injury occurred and falls within the statutory definition of "serious bodily injury. If such evidence is not presented at trial or if the jury does not find that serious bodily injury has occurred within the meaning of the statute, the prosecution has failed to meet its burden of proof. It then is limited to the 15 year maximum penalty set forth in subsection 1 of section 2119.

Crucial to the determination of the maximum penalty which the district court was entitled to impose is an examination of whether or not the serious bodily injury was an element of the offense or a sentencing factor. The leading case in this area is *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411 (1986). In *McMillan*, the court reviewed the constitutionality of a Pennsylvania statute authorizing a minimum five year sentence for anyone who was found to have visibly possessed a firearm in the commission of the offense. In the text of the law, the Pennsylvania legislature specifically provided that the statute be applied as a sentencing factor only. In its determination that the statute was properly a sentencing factor, the court relied on several indicia. The legislative definition and its intent to apply solely to sentencing were clearly set forth. The elements of the offenses McMillan was charged with did not change. The maximum penalties for those offenses were contained in separate statutes and were not affected by this provision. The major effect - to impose a minimum sentence in cases where the use of a handgun was visible - did not render the law unconstitutional. That fact alone did not negate the presumption of innocence or relieve the prosecution of the burden of proving the underlying crime, did not alter the maximum penalty available, nor create a separate offense calling for a separate penalty.

Petitioner Jones was charged by Indictment in Count One, "on or about December 7, 1992, in the County of Kern, State and Eastern District of California, while possessing a firearm, ... did take a motor vehicle, ... that had been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force, violence and intimidation, in violation of Title 18, United States Code,

§§ 2119 and 2." Count Two charged the Use of a Firearm During and In Relation to a Crime of Violence, to wit, Carjacking, in violation of 18 U.S.C. § 924(c)(1). There was no notice to the petitioner Nathaniel Jones in the indictment that serious bodily injury had occurred during the offense. At the time of arraignment, Jones was advised that he was facing a statutory maximum of fifteen years as to Count One and five years consecutive as to Count Two. In the discovery provided by the government, there was information that Mutanna had been hit on the side of his head, however, nothing to indicate that he had suffered a hearing loss or that his eardrum had been punctured at any time relevant to the carjacking. The Government's Trial Brief made no mention of serious bodily injury and in the trial itself, there was no indication that serious bodily injury within the meaning of 18 U.S.C. § 1365 had occurred. As a result of this lack of notice, Jones believed that injury was not involved in this case and that he would not have to litigate this issue. He did not request any medical reports of Mutanna prior to sentencing and did not make a request for medical examination of Mutanna at a point more recent to the injury.

The first notice petitioner Jones had that serious bodily injury had occurred was in the initial presentence investigation report. At that point, it was over a12 months after the offense and the physician who examined Mutanna was no longer in the area. As Jones was not on notice that injury was involved, he did not have a fair chance to litigate the issue either legally or factually. The failure to notify Jones prior to sentencing of the existence of serious bodily injury within the meaning of section 1365 violates the concepts of notice and fairness embodied in the due process clause.

Further, the jury did not make a determination that the injury which occurred was serious bodily injury as set forth in Title 18. There was no evidence of injury and the jury was never instructed to find that they needed to determine if serious bodily injury had occurred within the meaning of the statute.

It is clear that Nathaniel Jones was convicted by the jury solely of carjacking as defined in section 2119 (1). The indictment charged Jones with carjacking, nothing else. The applicable statute as well as constitutional standards dictate that the government plead and prove any serious bodily injury beyond a reasonable doubt. Because the government did not, Jones was subject only to a maximum penalty of 15 years. The district court then, erroneously sentenced Jones to the maximum twenty-five year sentence provided for in subsection (2) which determination was affirmed by the Ninth Circuit. As this determination was in violation of due process safeguards afforded to petitioner by the U.S. Constitution, his sentence cannot stand.

THE CONDUCT OF THE PETITIONER IS INSUFFICIENT TO BRING HIS CONDUCT WITHIN THE MEANING OF 18 U.S.C. § 2119, OTHERWISE THE STATUTE WOULD BE AN INVALID EXERCISE CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

The Constitution states "the Congress shall have the power. . . to regulate commerce with foreign nations, and among the several states, and with the Indian nations. U.S. Const. Art. I, § 8. The Courts have interpreted this clause as conferring substantial power on Congress to regulate interstate commerce. However, the Supreme Court recently stressed that the Commerce Clause does not obliterate the distinctions between federal and state power. *United States v. Lopez*, 514 U.S. 549,

115 S.Ct. 1624, 131 L.Fd.2d 626 (1995). In *United States v. Lopez*, this Court addressed a challenge to Congress' authority under the Commerce Clause. The Court conceded that prior cases advanced a broad interpretation of the Commerce Clause, but added that the commerce authority must be subject to stricter review when such regulation impinges on traditional state powers. Specifically, the Supreme Court wrote:

> But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Id. at 1628-1629.

The Court then divided Congress' commerce power into three general categories.

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. . .

Id. at 1629 (citations omitted).

The Court concluded that in determining the legality of a statute which seeks to regulate an activity which is not directly connected to interstate commerce or is purely intrastate in nature, that activity must substantially affect interstate commerce.

> Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. Within this

> final category, admittedly, our case law has not been clear whether an activity must affect or substantially affect interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. . . . We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity substantially affects interstate commerce.

115 S. Ct. at 1629-1630.

In order for the government to obtain a conviction at trial for the crime of carjacking under 18 U.S.C. § 2119 they must establish as an essential element of that crime that the motor vehicle "has been transported, shipped, or received in interstate or foreign commerce". This element must be proved to the jury beyond a reasonable doubt. Here the government's theory to establish this element was that the motor vehicle was transported in interstate commerce after manufacture. To answer the question about whether this evidence is sufficient to sustain a conviction for carjacking in federal court this court must first answer the question whether Congress could constitutionally prohibit the taking of motor vehicles that at any time crossed a state line under the power vested in it by the Commerce Clause to regulate commerce .. among the several States.

In *Lopez*, this court identified three broad categories of activity that Congress may regulate under its commerce power. *Lopez*, *supra* at 1629 These categories are: 1) The channels of interstate commerce; 2) instrumentalities of interstate commerce; 3) activities having a substantial affect on interstate commerce.

The motor vehicle in this case was a private vehicle that was not engaged in or used in interstate commerce. The government must rely on the Congress's power to

regulate intrastate activities that "substantially effect" interstate commerce. *United States v. Lopez*, *supra* at 1630. It is hard to understand how driving a car less than a mile which has previously been shipped over a state line has any effect on interstate commerce, let alone a substantial effect. Just as the Court in *Lopez* invalidated the Gun Free School Zones Act because it contained no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce *United States v. Lopez, supra* at 1631, to read the statute here broadly would completely eliminate any such required jurisdictional element. If the statute is read this in such a broad manner, there is no jurisdictional element to assure the required "substantial effect" on interstate commerce and the statute would be unconstitutional as beyond the power of the Congress to enact under the Commerce Clause. Therefore, this court should require a finding of a substantial effect on interstate commerce before a conviction of carjacking will be sustained. Since the facts of this case lack any such nexus to interstate commerce, the evidence was insufficient to support the conviction and it should be reversed.

THIS COURT SHOULD DECIDE THE IMPORTANT QUESTION OF FEDERAL LAW WHETHER IT IS DOUBLE JEOPARDY FOR A CRIMINAL PETITIONER TO BE SENTENCED TO A TERM OF IMPRISONMENT FOR CARJACKING AS WELL AS A CONSECUTIVE TERM FOR USE OF A FIREARM DURING THE CARJACKING, WHERE THE USE OF THE FIREARM IS AN ESSENTIAL PART OF THE UNDERLYING OFFENSE.

The rule of lenity prohibits the government from convicting and punishing a petitioner more than once for conduct arising from the same transaction absent congressional intent to the contrary. In those cases where congressional intent is not

clear or is lacking, the rule of lenity requires that doubts be resolved against turning a single transaction into multiple offenses. *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955) Ambiguities in the law are to be resolved in favor of lenity. *United States v. Sanchez-Vargas*, 878 F.2d 1163 (9th Cir. 1989)

In determining whether or not the same act or transaction constitutes a violation of two different statutory provisions is whether each provision requires proof of an additional fact which the other does not. *United States v. Blockburger*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) The assumption is that Congress does not usually intend to punish the same offense under two distinct statutes and in those circumstances there the *Blockburger* test fails, there can be no cumulative punishments in the absence of clear legislative intent. *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432 (1980)

The crime of armed carjacking went into effect in October 1992. The offense which provides enhanced penalties for armed auto robberies was enacted as Congress sought to control the theft of vehicles at gun-point because of its growing threat to human life and the economic well-being of the Nation. Pub.L.No. 102-519, § 2119, note (b), (October 25, 1992); 106 Stat. 3384. The legislative history of the AntiCar Theft Act of 1992 by its title and subtitle specifically state that the penalties for vehicle theft are being enhanced by the creation of the federal offense. That Congress intended to impose a stiff sentence upon a person who commits a violent felony while in possession of a gun is clear, however, the legislative history is silent as to cumulative

punishments for the use of the same firearm and the enhancements contained in the provisions of 18 U.S.C. § 924(c).

Jones' conviction and punishment for carjacking and the use of a firearm during and in relation to a crime of violence fails the test enunciated in *Blockburger*. The underlying felony of carjacking requires that the individual possess a firearm in committing the offense. At the time that this offense was committed, in those instances where a vehicle is taken by force or intimidation from the person of another but without a firearm, that individual could not be found guilty of carjacking. As the possession of a firearm is a necessary element of the offense, under the principles set forth in *Whalen*, Jones convicted and sentenced for carjacking cannot also be charged and convicted of a violation of 18 U.S.C. § 924(c)(1), an element of that same carjacking offense. To construe the statutes as allowing the gun count to be stacked, would in essence stack one gun count on another. Such a result is a violation of the prohibition against double jeopardy.

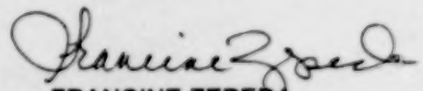
CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari to the Ninth Circuit be granted.

DATED: September 25, 1997

Respectfully submitted,

QUIN DENVIR
Federal Defender



FRANCINE ZEPEDA
Assistant Federal Defender
Attorney for Petitioner
Nathaniel Jones

APPENDIX A

(Cite as: 116 F.3d 1487, 1997 WL 355922 (9th Cir.(Cal.)))

NOTICE: Ninth Circuit Rule 36-3 provides that dispositions other than opinions or orders designated for publication are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Donovan Dwayne OLIVER; Darryl Lee McMILLAN; Nathaniel JONES, Defendant-Appellants.

Nos. 96-10176, 96-10177, 96-10179.

United States Court of Appeals, Ninth Circuit.

Submitted April 21, 1997 [FN**]

FN** The panel finds this case appropriate for submission without argument pursuant to Fed.R.App.P. 34(a) and Ninth Circuit Rule 34-4.

Decided June 27, 1997.

Appeal from the United States District Court for the Eastern District of California; No. CR-92-05264-REC; Robert E. Coyle, District Judge, Presiding

Before: HUG, Chief Judge, CANBY and HAWKINS, Circuit Judges.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**1 Donovan Oliver, Darryl McMillan, and Nathaniel Jones appeal their sentences imposed on resentencing following their convictions for carjacking in violation of 18 U.S.C. § 2119 and for use of a firearm in violation of 18 U.S.C. § 924(c). In a prior appeal, we affirmed defendants' convictions but remanded for resentencing. We now affirm their sentences.

The district court was not required to identify an independent basis for its departures when it resentenced defendants to the maximum sentence allowed--300 months. Both our earlier opinion in this case, United States v. Oliver, 60 F.3d 547, 556 (9th Cir.1995), and U.S.S.G. § 2K2.4 itself, make clear that the district court could rely on this guideline alone to depart upward. Furthermore, the upward departures here were not unreasonable because defendants were sentenced at the top of the guideline ranges that would result absent the § 924(c) convictions.

We also find no merit in Oliver's and McMillan's contention that the district court violated the Ex Post Facto Clause by using the 1993 Guidelines in effect at the time of sentencing, rather than the 1992 Guidelines in effect at the time of their offenses. The Ex Post Facto Clause is violated when a guideline change (1) applies to events before its enactment, and (2) disadvantages the defendant. United States v. Carson, 988 F.2d 80, 81-82 (9th Cir.1993). No such violation occurred here, however, because as the government correctly notes, the 1993 Guidelines are actually more favorable to defendants. Under the 1992 Guidelines, the district court would have had to apply a seven-level enhancement for discharge of a firearm. U.S.S.G. § 2B3.1(b)(2)(A) (1992). The 1993 Guidelines, by contrast, forbid such an enhancement under these circumstances, instead authorizing a district court to depart upward to correct any injustice. Even after accounting for the two-point enhancement for carjacking under the 1993 Guidelines, U.S.S.G. § 2B3.1(b)(1)(B), therefore, defendants' guideline ranges were lower under the 1993 version. Moreover, the upward departure provision did not prejudice the defendants because the district judge made clear that under either set of Guidelines he would sentence the defendants to the 300 months that our remand imposed as an upper limit.

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APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DONOVAN DWAYNE OLIVER; DARRYL LEE MCMILLAN; NATHANIEL JONES, *Defendants-Appellants.*	Nos. 93-10770 93-10775 93-10779 D.C. No. CR-92-05264-REC OPINION

Appeals from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief Judge, Presiding

Argued and Submitted
December 12, 1994*—San Francisco, California

Filed July 6, 1995

Before: Procter Hug, Jr., William C. Canby, Jr.
and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

SUMMARY

Criminal Law and Procedure/Sentencing

The court of appeals affirmed judgments of conviction in part, vacated in part, and remanded. The court held that in enacting the federal carjacking statute, Congress did not

*Submitted on the briefs as to No. 93-10775.

exceed its authority under the Commerce Clause. The court also held that the appellants' sentences were incorrectly subjected to a seven-level upward departure based on the use of a firearm in the carjacking.

Appellants Donovan Oliver, Darryl McMillan, and Nathaniel Jones approached two persons sitting in a parked car in a parking lot. They ordered the victims out of the car at gunpoint. Oliver stuck the barrel of his firearm into one victim's ear, causing a perforated eardrum, which resulted in numbness and hearing loss. The appellants searched the victim's pockets and then stole their car, forcing one victim to accompany Jones in the stolen car. That victim was released a short distance later. The appellants were arrested a short time later after Jones crashed the stolen car during a chase with police.

The appellants were indicted on one count of carjacking/aiding and abetting and one count of using a firearm during a crime of violence/aiding and abetting. A jury convicted the appellants on all counts. The appellants were each sentenced under the 25-year (300 month) statutory maximum on the carjacking count, because one victim suffered serious bodily injury during the crime. They were also sentenced to a consecutive term of 60 months for the use of a firearm. The appellants all appealed their sentences and convictions.

[1] In enacting the carjacking statute, Congress did not exceed its authority under the Commerce Clause, because carjacking and cars are sufficiently related to interstate commerce. [2] A recent Supreme Court case holding that Congress exceeded its power under the Commerce Clause when it made it a federal offense for a person to possess a firearm within 1000 feet of school did not alter the court of appeals' view.

[3] The government is not required to prove that a defendant actually possessed a firearm in order to convict a person for carjacking under an aiding and abetting theory. A conviction only requires evidence that a defendant knew that a co-defendant had and intended to use a firearm during a carjacking, and intended to aid in that endeavor.

[4] Although carjacking is a general intent crime, and voluntary intoxication is not a defense to a general intent crime, evidence of drug intoxication that related to the defendant's sanity during the time of the offense is admissible. [5] However, the district court did not abuse its discretion in refusing to allow Oliver to present evidence of his voluntary intoxication because Oliver did not present an insanity defense, and the proffered testimony that he drank heavily on the day of the carjacking would not necessarily show that he was incapable of committing the crime charge or appreciating the wrongfulness of his acts.

[6] "Serious bodily injury" was a factor that the district court was free to consider in sentencing the appellants, even though the defendants did not become aware until the sentencing phase that there would be a contention that the case involved serious bodily injury for the purposes of determining the appropriate sentence under the carjacking statute. [7] The separate provisions in the carjacking statute for different sentences, based on whether serious bodily injury or death results, exist for sentence enhancement purposes and are not elements of separate offenses. [8] The carjacking statute sets forth one offense, with several possible penalties.

[9] While the appellants were not informed through the indictment or at the arraignment that they were facing a 25-year maximum sentence based on the possible presence of "serious bodily injury," this omission did not amount to a due process violation. The evidence at trial suggested that the victim suffered injury. The presentence report mentioned the victim's injuries, and the appellants were given medical reports on his condition. The appellants were given an opportunity to contest the issue at sentencing.

[10] The Sentencing Guidelines provide for a four-level increase "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." [11] The district court's conclusion that the abduction of one victim facilitated the appellants' escape was not clear error because the evidence showed that Jones forced the victim to accompany him as he drove the stolen car away from the crime scene. The evidence supported the conclusion that the abduction made a quicker get-away possible and prevented the victim from crying out or calling the police. [12] Oliver's sentence should be remanded because, although the district court retracted its initial obstruction of justice enhancement for Oliver, it did not recalculate his sentence without the two-level enhancement for allegedly testifying untruthfully at trial.

[13] Pursuant to the Sentencing Guidelines, a seven-level enhancement would normally have been applicable to the appellants' carjacking sentences because a gun was discharged during the offense. However, because the appellants were also convicted of using a firearm during a crime of violence, which carries a mandatory consecutive five year sentence, the appellants' carjacking sentences were not subject to the seven-level enhancement. [14] The maximum combined penalty for the underlying carjacking conviction plus the conviction for using a firearm during a crime of violence could not exceed the maximum penalty available for the carjacking with the seven-level enhancement.

COUNSEL

Anthony P. Capozzi, Fresno, California, for defendant-appellant Oliver; Richard G. Cenci, Fresno, California, for defendant-appellant McMillan (on the briefs); and Francine Zepeda, Assistant Federal Public Defender, Fresno, California, for defendant-appellant Jones.

Patrick Hanley, Assistant United States Attorney, Fresno, California, for the plaintiff-appellee.

OPINION

HAWKINS, Circuit Judge:

Defendants Donovan Dwayne Oliver, Darryl Lee McMillan, and Nathaniel Jones appeal their convictions and sentences for carjacking/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 2119, and using a firearm during a crime of violence/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c). We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, and vacate and remand in part.

I.

Background

The evidence at trial disclosed the following facts: On December 7, 1992, Oliver, Jones and McMillan drove to a liquor store in Bakersfield, California. In the liquor store parking lot, they approached Ali Nassar Mutanna and Abdullah Mardaie, who were in Mardaie's parked car. After ordering Mutanna and Mardaie out of the car, Oliver held them at gunpoint. Oliver stuck the barrel of his firearm into Mutanna's left ear and held it there to ensure that Mutanna would not move, causing Mutanna's ear to bleed profusely. Meanwhile, Jones and McMillan searched Mutanna's and Mardaie's pockets. Oliver then forced Mutanna behind the liquor store, ordered him to lie on the ground, and struck him in the head while he was lying there. Oliver told Mutanna that Oliver would kill him if he moved. Oliver then got into Jones' car, which was being driven by McMillan, and fired a shot as they drove away.

Jones had forced Mardaie into Mutanna's car, and Jones followed Oliver and McMillan as they left the scene. After they travelled a short distance, Jones ordered Mardaie out of the car.

After defendants left, Mutanna flagged down a police car. Police officers located Mutanna's car a few blocks away from the liquor store. Jones fled in Mutanna's car when he noticed the police car approaching. After a short car chase, Jones crashed Mutanna's car and was apprehended. Jones' car was also located nearby, with the gun used by Oliver in the back seat. Oliver and McMillan were arrested shortly thereafter.

Defendants were indicted on December 30, 1992, with one count of carjacking/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 2119, and one count of using a firearm during a crime of violence/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c). On July 29, 1993, defendants were convicted by a jury on all counts. Defendants were sentenced under the 25-year (300 months) statutory maximum set forth in § 2119(2), because Mutanna suffered serious bodily injury during the crime. Defendants were each sentenced to a total of 300 months on the carjacking count and a consecutive 60 months for the use of a weapon.

Defendants timely appealed their sentences and convictions on December 17, 1993.

II.

Grand Jury Indictment

Defendants Oliver and McMillan first argue that the district court lacked jurisdiction because the indictment against them was returned in a courtroom closed to the public. *See* Rule 6(f), Fed. R. Crim. P. ("indictment[s] shall be returned by the grand jury to a federal magistrate in open court"). "[E]rrors in the grand jury indictment procedure are subject to harmless

error analysis unless 'the structural protections of the grand jury have been compromised as to render the proceedings fundamentally unfair.' " *United States v. Lennick*, 18 F.3d 814, 817 (9th Cir. 1994) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-57 (1988)). Because defendants do not claim prejudice as a result of the indictment being returned in a closed courtroom, any defect was harmless. In any event, defendants did not raise this issue before the district court, so they waived the right to raise the issue on appeal. *United States v. Kahlon*, 38 F.3d 467, 469 (9th Cir. 1994) (objection based upon the failure to return an indictment in open court is not jurisdictional and is waived if not raised prior to trial); Rule 12(b)(1), Fed. R. Crim. P.

III.

Commerce Clause

[1] Defendants contend that Congress exceeded its power under the Commerce Clause in enacting the carjacking statute, because carjacking is not sufficiently related to interstate commerce. We recently rejected this argument in *United States v. Martinez*, 49 F.3d 1398, 1400-01 (9th Cir. 1995). In so ruling, we joined with every other circuit court that had addressed the question.

[2] The Supreme Court's recent decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), does not alter our view. In *Lopez*, the Supreme Court held that Congress exceeded its power under the Commerce Clause when it made it a federal offense for a person to possess a firearm within 1000 feet of a school. *See* 18 U.S.C. § 924(q). The Court noted that "§ 922(q) contains no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 1631. It also explained that the statute does not seek to protect "an instrumentality of interstate commerce." *Id.* at 1630. Finally, the Court pointed out that there was no showing of a substan-

tial effect of the prohibited activity on interstate commerce, and Congress had made no findings that there was such an effect. *Id.* at 1631-32.

The carjacking statute has a very different background. First, it applies only to the forcible taking of a car "that has been transported, shipped, or received in interstate or foreign commerce." 18 U.S.C. § 2119. *See United States v. Hanna*, No. 94-10131, Slip Op. at 5965-66 & n. 2 (9th Cir., May 31, 1995) (holding that "[18 U.S.C. § 922(g)'s] requirement that the firearm have been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause"). Second, cars are themselves instrumentalities of commerce, which Congress may protect. *See United States v. Watson*, 815 F. Supp. 827, 831 (E.D. Pa. 1993) (citing *United States v. Perez*, 402 U.S. 146, 150 (1971), and upholding § 2119 under the Commerce Clause because it protects an instrumentality of commerce).

Lastly, we note that Congress was not silent regarding the effect of carjacking on interstate commerce. As we stated in *Martinez*, Congress relied on, among other things, "the emergence of carjacking as a 'high-growth industry' that involves taking stolen vehicles to different states to retitle, exporting vehicles abroad, or selling cars to 'chop shops' to distribute various auto parts for sale." *Martinez*, 49 F.3d at 1400 n.2 (citing legislative history). That Congress was addressing economic evils of an interstate nature differentiates the carjacking statute from the firearms statute invalidated in *Lopez*. "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 115 S. Ct. at 1634. Carjacking, on the other hand, is exactly that sort of economic activity, as Congress clearly concluded. We accept that conclusion, and accordingly reject the defendants' contention.

IV.

Equal Protection

Having complained that carjacking does not impact interstate commerce, defendants Oliver and McMillan next argue that the carjacking statute violates equal protection because it only prohibits the theft of cars previously "transported, shipped, or received" in interstate commerce, and does not prohibit the theft of cars that have not been "transported, shipped or received" in interstate commerce. Because defendants did not raise this issue before the district court, we decline to address it on appeal. *See United States v. Cupa-Guillen*, 34 F.3d 860, 863-64 (9th Cir. 1994) (failure to present equal protection challenge to district court constitutes waiver of the claim).

V.

Double Jeopardy

Defendants contend that their convictions under § 2119 and § 924(c) violate the Double Jeopardy Clause because both statutes punish the same conduct. This argument is also foreclosed by our recent opinion in *United States v. Martinez*, 49 F.3d at 1402.

VI.

Sufficiency of Evidence

Defendant Jones argues that there was insufficient evidence to support his carjacking conviction under the aiding and abetting theory. Although Jones moved for judgment of acquittal at the close of the government's case, he did not renew the motion at the close of all evidence. We therefore review for plain error. *United States v. Ramirez*, 880 F.2d 236, 238 (9th Cir. 1989).

Relying on *United States v. Dinkane*, 17 F.3d 1192 (9th Cir. 1992), Jones contends that he was not properly convicted of carjacking because there was no evidence that he possessed a firearm. *Dinkane* involved a conviction for armed bank robbery under 18 U.S.C. § 2113(d), an aggravated form of bank robbery under 18 U.S.C. § 2113(a). We noted that to sustain a § 2113(d) conviction for an aider and abettor, the government must show not only that the defendant knowingly and intentionally aided the act of bank robbery, but also the commission of the aggravating element. *Id.* at 1197. We therefore concluded that the defendant get-away driver could not be convicted of armed bank robbery under an aiding and abetting theory where there was no evidence that he knew — before or during the bank robbery — that the robbers had and intended to use weapons. *Id.* at 1198.

[3] Contrary to Jones' contention, *Dikane* does not require that the government prove that he actually possessed the firearm. *Dikane* only requires proof that Jones knew that a co-defendant had and intended to use the firearm during a carjacking, and intended to aid in that endeavor. There was ample evidence of this.

The evidence demonstrated that, on the evening of the carjacking, Jones, Oliver and McMillan drove to a liquor store in Jones' car. Oliver testified that when he got into Jones' car, he noticed a gun on the floor of the back seat. Mutanna testified that when defendants approached him in the liquor store parking lot, he could see that Oliver was carrying a gun. Oliver held Mutanna and Mardaie at gunpoint, while Jones and McMillan rifled their pockets. Oliver also used his gun to keep Mutanna behind the store, and fired a shot from Jones' car, as Jones escaped in the Mutanna's car. A reasonable jury could have easily concluded from these facts that Jones knew Oliver had a firearm, that Jones knew Oliver intended to use the firearm during the carjacking, and that Jones intended to and did aid in that endeavor. Jones' conviction was not plain error.

VII.

Voluntary Intoxication Evidence

Defendant Oliver takes issue with the district court's refusal to allow evidence of his voluntary intoxication. We review the exclusion of evidence for abuse of discretion. *United States v. Rahm*, 996 F. 2d 1405, 1410 (9th Cir. 1993).

[4] As the district court correctly concluded, carjacking is a general intent crime, *Martinez*, 49 F.3d at 1401, and voluntary intoxication is not a defense to general intent crimes, *see, e.g., United States v. Sneezer*, 983 F.2d 920, 922 (9th Cir. 1992) (voluntary intoxication may be a defense to a specific intent crime, but is not a defense to a general intent crime). Nevertheless, Oliver argues that *United States v. Hartfield*, 513 F.2d 254 (9th Cir. 1975), requires that he be allowed to present the evidence. In *Hartfield*, we held that evidence of drug intoxication was admissible because it related to the defendant's sanity during the time of the offense. *Id.* at 259-60.

[5] *Hartfield* is not applicable to this case. First, Oliver did not present an insanity defense. Moreover, unlike the proffered testimony in *Hartfield*, Oliver's testimony would only show that he drank heavily on the day of the carjacking. This would not necessarily show that Oliver was incapable of committing the crime charged or appreciating the wrongfulness of his acts. Accordingly, we find no abuse of discretion in the district court's refusal to allow evidence of Oliver's voluntary intoxication.

VIII.

Serious Bodily Injury

[6] Defendants also argue that "serious bodily injury" as set forth in § 2119(2) is an element of the carjacking offense

which must be pleaded in the indictment and proved beyond a reasonable doubt at trial. Defendants point out that it was not until the sentencing phase that they became aware that there would be a contention that the case involved serious bodily injury for purposes of § 2119(2). The district court concluded that serious bodily injury is a factor which it was free to consider in sentencing defendants. We agree with the district court.

The Supreme Court has emphasized that the key to distinguishing between elements of an offense and sentencing factors is the legislature's definition of the elements of the offense. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986). We therefore must look to the plain language and structure of the statute. *United States v. Young*, 936 F.2d 1050, 1054 (9th Cir. 1991). The carjacking statute, 18 U.S.C. § 2119, reads as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation or attempts to do so, shall —
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

[7] In *United States v. Williams*, ___ F.3d ___, 1995 WL 236715, * 7 (11th Cir. 1995), the Eleventh Circuit concluded

that "Congress[ ] inten[ded] that subparagraphs (2) and (3) be treated as sentencing enhancement features, and not elements of the offense." According to the Eleventh Circuit, the natural reading of the text — in which the crime of carjacking is defined in the first paragraph and the subparagraphs simply set forth different degrees of sentencing — suggests that the subparagraphs are sentencing provisions. *Id.* We agree with the Eleventh Circuit and conclude that the serious bodily injury and death language in § 2119 exist for sentence enhancement purposes. *See also United States v. Ryan*, 9 F.3d 660, 669 (8th Cir. 1993), *modified on other grounds*, 41 F.3d 361 (8th Cir. 1994) (en banc) (concluding that "if death results" provision of federal arson statute, 18 U.S.C. § 844(i), is sentencing enhancer), *cert. denied*, ___ S.Ct. ___, 1995 WL 50599 (1995); *United States v. Patterson*, 38 F.3d 139, 143-44 (4th Cir. 1994) (concluding that "if death or serious bodily injury results" language in 21 U.S.C. § 841(b) (1)(C) is sentencing enhancement), *cert. denied*, ___ S.Ct. ___, 1995 WL 50065 (1995). The plain text of the statute establishes one offense, as defined in the first main paragraph. That definition of the offense is set apart by a comma, followed by the word "shall" and then three sentencing possibilities. This does not establish three separate, substantive offenses.

Our decision in *United States v. Young*, 936 F.2d 1050 (9th Cir. 1991), is instructive. In that case, we determined that the weapon provision of 18 U.S.C. § 111 is a sentencing factor, rather than an element of the crime of assaulting a federal officer. The statute under which the defendant was convicted read as follows:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three (3) years, or both.

> Whoever, in the commission of such acts uses a deadly or dangerous weapon shall be fined not more than ten (10) years, or both.

18 U.S.C. § 111 (amended 1988). In concluding that Congress intended the weapon provision to be a sentencing factor, we noted that it was not "structurally separated from the rest of the section, indicating that the section contains only one substantive offense." *Young*, 936 F.2d at 1054. Moreover, the "weapon provision [was] not drafted as a stand-alone offense; it incorporate[d] the predicate acts by reference rather than affirmatively setting forth any specific elements." *Id.*; *see also Ryan*, 9 F.3d at 667 (use of semi-colons and the conjunction "and," as well as conclusion that latter sections of arson statute regarding resulting bodily injury and death could not stand alone, suggest treatment as a single offense).

[8] Similarly, Congress did not enact § 2119 and its subparts in "structurally separate" provisions. It did not redefine the essential elements of carjacking in subparagraphs (1), (2) or (3), and those provisions could not stand alone, independent of the main paragraph. These factors lead to the conclusion that § 2119 sets forth one offense, with several possible penalties.

Defendants argue that *Young* is distinguishable because, in a subsequent amendment, the weapon provision of § 111 was specifically labelled "Enhanced Penalty," and therefore Congressional intent is clear. It is true that in *Young* we found this subsequent amendment to have "persuasive value." *Young*, 936 F.2d at 1054.[1] But we have similar persuasive evidence of congressional intent in this case. Section 2119 was adopted as part of the overall "Anti-Car Theft Act of 1992" (the "Act"), enacted at a time when carjacking crimes were increasing at an alarming rate. *See* Public Law 102-519, 102d

[1]Although we recognized that "the view of a later Congress does not establish definitely the meaning of an earlier enactment." *Id.*

Congress, 106 STAT 3384 (1992). In the Act, § 2119 and its subparagraphs come directly under the title, "Tougher Law Enforcement Against Auto Theft," and the subtitle, "*Enhanced Penalties* for Auto Theft." *Id.* (emphasis added). Clearly the title, and undoubtedly the subtitle, suggest an intent that § 2119 set forth enhanced penalties. Other portions of the legislative history suggest the same conclusion. *See, e.g.*, H.R. Rep. No. 102-851 (II), 102nd Cong., 2d. Sess. 14, *reprinted in*, 1992 U.S.C.C.A.N. 2847 ("the Committee adopted an amendment . . . increasing the maximum prison term for carjacking to 25 years, instead of 15 years . . . when carjacking results in bodily injury. If death results, the penalty could be life in prison and a fine."); H.R. Rep. No. 102-851 (II), 102nd Cong., 2d. Sess. 30, 1992 U.S.C.C.A.N. 2863 ("H.R. 4542 also would provide for new and enhanced penalties (including fines) for certain crimes, including armed robberies of motor vehicles . . ."); H.R. Rep. No. 102-851 (II), 102nd Cong., 2d. Sess. 61, 1992 U.S.C.C.A.N. 2894 ("The Committee's substitute also increased the penalty for 'carjackings' when serious bodily injury occurs over and above the penalties in the bill reported by the Judiciary Committee."). In fact, nothing in our review of the Act or its legislative history even remotely indicates that Congress intended that serious bodily injury and death be additional carjacking elements which must be proved beyond a reasonable doubt at trial.

We also reject defendants' contention that the carjacking statute is similar to the statute construed in *United States v. Gonzales-Medina*, 976 F.2d 570 (9th Cir. 1992). In *Gonzales-Medina*, we concluded that the provisions of 8 U.S.C. § 1326,[2]

[2]The statute provides in relevant part:

> (a) Subject to subsection (b) of this section, any alien who—
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at

dealing with the deportation of aliens, comprised two separate crimes, with separate elements. Unlike the subparagraphs of the carjacking statute, § 1326 (a) and (b) stand alone, each with its own elements and sentence provisions. Subsection (a) states that it is "subject to subsection (b);" while subsection (b) contains the language "[n]otwithstanding subsection (a)." The structure and language of § 1326 is very different from that of the carjacking statute; *Gonzales-Medina* is not controlling.

[9] While defendants were not informed through the indictment or at arraignment that they were facing the 25-year maximum, this omission does not amount to a due process violation. *See, e.g., Young*, 936 F.2d at 1053 (indictment need not plead sentencing factor); *Lamere v. Risley*, 827 F.2d 622, 624 (9th Cir. 1987) (notice in the information that government will seek sentence enhancement not necessary); *United States v. Dunn*, 946 F.2d 615, 619 (9th Cir.) (prior violent felonies used for sentence enhancement need not be charged in indict-

a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisonment not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection —

(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisonment not more than 15 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 15 years, or both.

ment or proved at trial), *cert. denied*, 502 U.S. 950 (1991). The evidence at trial suggested that Mutanna suffered injury. The probation department reported in the presentence report that Mutanna suffered a perforated eardrum, causing numbness and some hearing loss, and defendants were given medical reports on the condition. Defendants concede that they were given an opportunity to contest the issue at sentencing. We note that defendants have never demonstrated that the information in the presentence report was inaccurate, or that the district court erred in determining that Mutanna suffered serious bodily injury. Having concluded that serious bodily injury is not an element of the offense, we are compelled to find that defendants received sufficient process for purposes of the Fifth Amendment. *See, e.g., West*, 826 F.2d at 912 (due process satisfied where prior convictions used for sentence enhancement were detailed in presentence report, defendant did not challenge prior convictions, and defendant did not show information in presentence report was materially false); *United States v. McDougherty*, 920 F.2d 569, 575 (9th Cir. 1990) (due process satisfied where sentencing enhancement factors are alleged in presentence report and proven by a preponderance of evidence), *cert. denied*, 499 U.S. 911 (1991).

IX.

Sentencing Guideline Issues

Defendants contend that the district court committed various sentencing errors. We review the district court's interpretation and application of the United States Sentencing Guidelines ("U.S.S.G.") de novo, while we review the district court's factual findings in the sentencing phase for clear error. *United States v. Buenrostro-Torres*, 24 F.3d 1173, 1174 (9th Cir. 1994).

A. Abuction

[10] In sentencing defendants, the district court applied U.S.S.G. § 2B3.1(b)(4)(A), which provides for a four-level

increase "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." "Abducted" is defined as "forced to accompany an offender to a different location." U.S.S.G. § 1B1.1. Defendants argue that although Mardaie was in the stolen car when Jones drove it away, there was no indication that this facilitated either the offense or the escape. We disagree.

[11] There can be no dispute that Mardaie was forced to accompany Jones as he drove the stolen car away from the crime scene. Jones followed Oliver and McMillan, who left the scene in Jones' car. The evidence easily supports the conclusion that the abduction made a quicker get-away possible and prevented Mardaie from crying out or calling the police. Furthermore, on this record, it is entirely possible that Jones thought he was taking the only living witness away from the crime. The district court's conclusion that Mardaie's abduction facilitated defendants' escape was not clear error.[3]

We also reject Oliver's and McMillan's suggestion that the district court failed to make the requisite findings regarding their role in the abduction under U.S.S.G. § 1B1.3. That section provides that a defendant may be accountable for the conduct of others that was "in furtherance of the jointly undertaken criminal activity" and "reasonably forseeable in connection with that criminal activity." *See* U.S.S.G. § 1B1.3, comment. (n. 2). We think it is obvious from the district court's rulings that he found the abduction to be in furtherance of the carjacking and foreseeable to defendants. And, as the discussion above demonstrates, this conclusion was fully supported by the evidence. *See United States v. Slater*, 971

[3]The district court also concluded that Mardaie's abduction facilitated the offense. Because the district court soundly concluded that the abduction facilitated defendants' escape, we need not reach that issue. *See United States v. Hernandez-Valenzuela*, 932 F.2d 803, 805 (9th Cir. 1991) (where the district court gives two alternative grounds for enhancement, so long as one ground is proper, no remand is necessary).

F.2d 626, 633 (9th Cir. 1992) (district court need only make generalized statement of its reasons for enhancement, so appellate court may tie sentencing decision to a factual basis in the record).

B. Obstruction of Justice

[12] At the sentencing hearing, the district court applied a two-level adjustment to defendant Oliver's sentence concluding that he testified untruthfully at trial. After Oliver filed his notice of appeal, however, the district court issued a Sentencing Order in which it retracted the obstruction of justice enhancement for Oliver. The district court stated that Oliver's testimony at trial not rise to a level warranting enhancement. Although the district court determined that obstruction of justice was not applicable, it did not recalculate Oliver's sentence without the two-level adjustment. Oliver argues that in light of this discrepancy, his sentence should be remanded, and we agree.

The commentary to § 3C1.1 provides that "testimony and statements should be evaluated in a light most favorable to the defendant." U.S.S.G. § 3C1.1, comment. (n. 1). We give great weight to the district court's assessment of Oliver's testimony. *See United States v. Barbosa*, 906 F.2d 1366, 1370 (9th Cir. 1990) (appellate court should give "due regard to the opportunity of the district court to judge the credibility of the witnesses"). Because the district court indicated that application of § 3C1.1 was not warranted, we remand this case for recalculation of defendant Oliver's sentence without the two-level adjustment.

C. Criminal History

Upon remand, the district court is also instructed to reconsider the appropriate Criminal History Category for Oliver. At sentencing, the district court adopted the presentence report finding that Oliver had nine criminal history points and a

Criminal History Category of IV. However, the district court's subsequent Sentencing Order suggested that Oliver had only six criminal history points, which would be a Criminal History Category of III. Although this discrepancy may have been nothing more than a clerical error, the district court should clarify the appropriate Criminal History Category and resulting sentence on remand.

D. Upward Departures

Finally, defendants argue that the district court erred in departing upward on their sentences. The district court relied on the presentence reports, which recommended an upward departure pursuant to U.S.S.G. § 2K2.4 to a total term of 360 months.[4] However, the probation department, and thus the district court, erred in applying § 2K2.4. Although defendants did not raise the issue before the district court, we address the issue to prevent a miscarriage of justice, and to ensure that defendants' do not serve sentences that exceed the guideline maximum. *See United States v. Young*, 470 U.S. 1, 15 (1985) (plain error doctrine permits the court to correct errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings"); *see also United States v. Agoro*, 996 F.2d 1288, 1291 (1st Cir. 1993) (addressing unpreserved legal claim to prevent defendant from serving sentence exceeding guidelines).

[13] Pursuant to U.S.S.G. § 2B3.1(b)(2)(A), a 7-level enhancement would have normally been applicable to defendants' carjacking sentences because a gun was discharged during the offense. However, because defendants were also

[4]U.S.S.G. § 5K2.3, which provides for departure on the basis of "extreme psychological injury" to the victim, did not factor into the probation department's recommended 360-month sentences. The district court suggested that § 5K2.3 was an additional ground for departure, but did not attribute any specific amount of its departure to that basis. Because the district court adopted the presentence reports, it apparently believed that departure to 360 months was justified under § 2K2.4 alone.

convicted of using a firearm under § 924(c), which carries a mandatory consecutive five year sentence, defendants' carjacking sentences were not subject to the 7-level enhancement. *See* U.S.S.G. § 2K2.4, comment. (n. 2). U.S.S.G. § 2K2.4 provides for an upward departure in those cases where the guideline range for the underlying offense (without the seven-level enhancement), when combined with the mandatory five-year sentence under § 924(c), produces a total maximum penalty that is less than the maximum of the guideline range that would have been applicable if there was no conviction under § 924(c). The upward departure may not exceed "the maximum of the guideline range that would have resulted had there not been a count of conviction under [§ 924(c)]." *Id.*

[14] There is no dispute that defendants' guideline ranges would have been greater without a conviction under § 924(c). While upward departure was therefore appropriate, that departure could not exceed the maximum of the guideline range that would have been applicable without the § 924(c) conviction. In other words, the maximum combined penalty for the underlying carjacking conviction *plus* the § 924(c) conviction could not exceed the maximum penalty available for the carjacking conviction with the seven-level enhancement. For each defendant, the maximum guideline range absent their § 924(c) conviction (and with the 7-level enhancement) was limited to 300 months (25 years) — the statutory maximum penalty for carjacking resulting in serious bodily injury. *See* U.S.S.G. § 5G1.1 (providing that the guideline range is restricted by the statutorily authorized maximum penalty). Therefore, with an upward departure under § 2K2.4, the *total* sentence for each defendant could not exceed 300 months (or 240 months for the carjacking conviction plus consecutive 60 months for the § 924(c) conviction). That is the maximum penalty that would have been applicable "had there not been a count of conviction under § 924(c)." U.S.S.G. § 2K2.4, comment. (n. 2). Because the district court erred in applying

§ 2K2.4 to increase defendants' total sentences to 360 months, we vacate and remand for resentencing.

We express no opinion here as to whether, or to what extent, additional departure may be warranted under U.S.S.G. § 5K2.3. Should the district court attribute any amount of departure to § 5K2.3 on remand, it should specify why the psychological injury in this case is more severe than that which would normally occur to a victim of this type of crime. *See* U.S.S.G. § 5K2.3 (departure may be warranted if a victim "suffered psychological injury much more serious than that normally resulting from commission of the offense").

AFFIRMED in part, and VACATED and REMANDED in part.

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SUPREME COURT, U.S.

No. 97-6203

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NATHANIEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2119(2), which provides for a longer term of imprisonment if serious bodily injury results from a carjacking, is a sentence-enhancement provision or a separate criminal offense.

2. Whether enactment of the federal carjacking statute exceeded Congress's authority under the Commerce Clause.

3. Whether Congress intended to permit separate conviction and punishment of a defendant, in a single proceeding, under both Section 2119 (as in effect in 1992) and 18 U.S.C. 924(c), where the defendant used or carried a firearm during and in relation to a carjacking.

IN THE SUPREME COURT OF THE UNITED STATES

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NATHANIEL JONES, PETITIONER

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UNITED STATES OF AMERICA

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OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. B1-B22) is reported at 60 F.3d 547. The court's second opinion (Pet. App. A1) is not reported, but the judgment is noted at 116 F.3d 1487 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1997. The petition for a writ of certiorari was filed on September 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted on one count of carjacking, in violation of 18 U.S.C. 2119 (1992), and one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). The court of appeals affirmed petitioner's conviction, but it vacated the sentence originally imposed by the district court. Pet. App. B1-B23. On remand, the district court sentenced petitioner to 300 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1.

1. On December 7, 1992, petitioner and two co-defendants, Donovan Oliver and Darryl McMillan, drove petitioner's car to the parking lot of a liquor store. They approached a parked car and ordered its two occupants, Ali Nassar Mutanna and Abdullah Mardaie, to get out. Oliver stuck a pistol into Mutanna's ear, perforating his eardrum, causing it to bleed profusely, and ultimately causing some loss of hearing. Petitioner and McMillan searched Mutanna's and Mardaie's pockets. Oliver then took Mutanna behind the liquor store, ordered him to lie on the ground, and struck him on the head. Oliver told Mutanna he would kill him if he moved. Pet. App. B5-B6, B17.

Oliver and McMillan drove away in petitioner's car, firing a shot as they left. Petitioner forced Mardaie into Mutanna's car and followed his co-defendants. After they had traveled a short distance, petitioner ordered Mardaie out of the car. Petitioner was apprehended shortly thereafter when he crashed Mutanna's car in

an effort to evade the police. The gun used by Oliver was recovered from the back seat of petitioner's car. Pet. App. B5-B6.

A federal jury found petitioner guilty of carjacking, in violation of 18 U.S.C. 2119, and of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. B6.[1] At sentencing, the district court concluded that, under 18 U.S.C. 2119(2), the maximum penalty for petitioner's carjacking offense was 25 years' imprisonment, because the offense resulted in "serious bodily injury" to Mutanna. Based on its reading of the applicable provisions of the Sentencing Guidelines and accompanying commentary, the district court imposed the statutory maximum sentence on the carjacking offense and added a five-year consecutive sentence for the violation of Section 924(c), for a total sentence of 30 years' imprisonment. See Pet. App. B20-B22.

2. The court of appeals affirmed petitioner's conviction. Pet. App. B1-B22. Relying on its prior decision in United States v. Martinez, 49 F.3d 1398 (9th Cir. 1995), cert. denied, 116 S. Ct. 749 (1996), the court rejected petitioner's claim that enactment of the federal carjacking statute exceeded Congress's authority under the Commerce Clause. In addressing that claim, the court explained that nothing in United States v. Lopez, 514 U.S. 549 (1995), altered the conclusion reached in Martinez that the carjacking statute is constitutional. Pet. App. B7-B8. The court further

---

[1] Petitioner and his codefendants were charged and convicted in part on the theory that they aided and abetted each other in committing all elements of the charged offenses. Pet. App. B6, B9-B10; 18 U.S.C. 2.

held that Martinez foreclosed petitioner's argument that he could not be convicted under both Section 2119 and Section 924(c) "because both statutes punish the same conduct," and it rejected his challenge to the sufficiency of the evidence to support his convictions. Pet. App. B9.

The court of appeals also rejected petitioner's contention that the reference to "serious bodily injury" in 18 U.S.C. 2119(2) defined an element of a separate offense, which the government was required to plead and prove at trial. Pet. App. B11-B17. The court concluded, instead, that Section 2119 outlaws carjacking and then sets out, in three subparagraphs, different maximum sentences based on the harm that results, in a particular case, from the commission of that offense. Id. at B14. Because an indictment need not allege the existence of a sentencing factor, and because petitioner was given a fair opportunity to contest the issue at sentencing, the court further rejected the argument that petitioner had been denied due process because he was not informed through the indictment or at arraignment that he might face the maximum 25-year sentence. Id. at B16-B17.

Although it affirmed petitioner's convictions, the court of appeals vacated the sentence initially imposed by the district court, because it held that that court had erred in computing the maximum combined penalty, under the Sentencing Guidelines and their accompanying commentary, for petitioner's two offenses. Pet. App.

B20-B22.[2] On remand, the district court imposed a 300-month sentence, and the court of appeals affirmed. Pet. App. A1.

ARGUMENT

1. Petitioner argues (Pet. 7-11) that the federal carjacking statute, 18 U.S.C. 2119, defines three separate criminal offenses, rather than a single offense with different maximum sentences depending on the existence of specified facts. The version of Section 2119 under which petitioner was charged and convicted provided as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall --
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

---

[2] The court concluded that under Guidelines § 2K2.4, application note 2, petitioner's combined sentence should have been limited, in the circumstances of this case, to the 25-year maximum specified in 18 U.S.C. 2119(2). Pet. App. B21.

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

18 U.S.C. 2119 (1992).[1] Petitioner contends that he may be sentenced to a maximum term of 15 years under Section 2119(1), rather than 25 years under Section 2119(2), because the government did not charge in the indictment and prove to the jury that his offense resulted in "serious bodily injury."

That argument is without merit. As petitioner acknowledges (Pet. 9), whether a particular fact must be alleged in the indictment and proved at trial depends on whether or not it is an element of the offense charged. E.g., McMillan v. Pennsylvania, 477 U.S. 79, 84-86 (1986). Whether a given factor that is mentioned in the governing statute is an element of the offense, as opposed to an aspect of the offense conduct that must be taken into account at sentencing, depends, in the first instance, on legislative intent. See Staples v. United States, 511 U.S. 600, 604-605 (1994); McMillan, 477 U.S. at 85-88.

As the court of appeals pointed out (Pet. App. B13), in Section 2119 "the crime of carjacking is defined in the first paragraph and the subparagraphs simply set forth different degrees of sentencing." A "natural reading" of the provision therefore indi-

[1] Section 2119 was amended in 1994 to substitute "with the intent to cause death or serious bodily harm" for "possessing a firearm as defined in section 921 of this title." Pub. L. No. 103-322, § 60003(a)(14), 108 Stat. 1970. We note that it is this version of Section 2119, not the 1992 version applicable here, that is excerpted at page 2 of the petition. The statute was amended again in 1996 to specify that the provisions of subsection (b) would apply in cases involving certain sexual assaults. Pub. L. 104-217, § 2, 110 Stat. 3020.

cates that it "does not establish three separate, substantive offenses," but rather "one offense, as defined in the first main paragraph," followed by "three sentencing possibilities." Ibid. Moreover, the statute's subsections are not "structurally separate," but rather form an integrated whole. Id. at B13-B14; United States v. Rivera-Gomez, 67 F.3d 993, 1000 (1st Cir. 1995). Finally, as the court below also observed (Pet. App. B14-B15), Section 2119's legislative history provides "persuasive evidence" of Congress's intent that serious bodily injury (or, under subsection (3), death) resulting from the offense conduct be considered as a sentencing factor, not alleged and proved as an element of the underlying carjacking offense. The other courts of appeals that have considered the matter have reached the same conclusion, and there is no need for further review. See Rivera-Gomez, 67 F.3d at 1000; United States v. Williams, 51 F.3d 1004, 1009 (11th Cir.), cert. denied, 116 S. Ct. 258 (1995).

On October 14, 1997, this Court heard oral argument in Almendarez-Torres v. United States, No. 96-6839. That case presents the question whether 8 U.S.C. 1326(b), which specifies maximum terms of imprisonment for certain deported alien felons who illegally reenter the United States, defines separate criminal offenses or merely specifies enhanced sentences, under certain circumstances, for the unauthorized reentry offense defined in Section 1326(a). Although both this case and Almendarez-Torres involve the difference between offense elements and statutory sentencing factors, neither case challenges the principles of

construction that govern the resolution of that question with regard to any given criminal statute. This Court's application of those principles to resolve a conflict over the provisions at issue in Almendarez-Torres is therefore unlikely to affect the correctness of the lower courts' consistent interpretation of Section 2119. Furthermore, the court below has already explicitly rejected petitioner's contention that its cases interpreting Section 1326 -- which hold that Section 1326(b) defines separate substantive offenses -- should control the outcome of this case. Pet. App. B15-B16. Thus, even if that position were to prevail in Almendarez-Torres, there would be no reason to remand this case to the court of appeals for further consideration. There is accordingly no need to hold this case pending the decision in Almendarez-Torres.

2. Relying on this Court's decision in United States v. Lopez, 514 U.S. 549 (1995), petitioner contends (Pet. 11-14) that Section 2119 exceeds Congress's authority under the Commerce Clause unless it is interpreted to require the government to prove, as an element of the offense, the existence of a "substantial effect on interstate commerce." The Court recently denied review in a case involving a similar contention, and there is no reason for a different result here. See Fraction v. United States, 118 S. Ct. 100 (1997).

In Lopez, this Court invalidated "a criminal statute that by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."

514 U.S. at 561. Section 2119, by contrast, applies only to the theft of motor vehicles that have been "transported, shipped, or received in interstate or foreign commerce." Such vehicles are, moreover, instrumentalities of interstate commerce, widely used in economic activity. Finally, in enacting the statute, Congress specifically found that carjacking had become a high-growth business, with criminals transporting stolen cars across state lines for resale at home and abroad. See Pet. App. B8; United States v. McHenry, 97 F.3d 125, 127 (6th Cir. 1996), cert. denied, 117 S. Ct. 992 (1997); United States v. Robinson, 62 F.3d 234, 237 (8th Cir. 1995).

Since this Court's decision in Lopez, the courts of appeals have uniformly upheld Section 2119 as a valid exercise of congressional authority under the Commerce Clause. See United States v. Romero, 122 F.3d 1334, 1339 & n.3 (10th Cir. 1997), petition for cert. pending, No. 97-6863 (filed Nov. 18, 1997); United States v. Hicks, 103 F.3d 837, 847-848 (9th Cir. 1996), cert. denied, 117 S. Ct. 1483 (1997); McHenry, 97 F.3d at 126-129; United States v. Randolph, 93 F.3d 656, 660 (9th Cir. 1996); United States v. Coleman, 78 F.3d 154, 157-160 (5th Cir.), cert. denied, 117 S. Ct. 230 (1996); United States v. Hutchinson, 75 F.3d 626, 627 (11th Cir.) (per curiam), cert. denied, 117 S. Ct. 241 (1996); United States v. Bishop, 66 F.3d 569, 575-590 (3d Cir.), cert. denied, 116 S. Ct. 681 (1995); Robinson, 62 F.3d at 235-237. In the absence of any conflict among the courts of appeals, the conclusion that the statute is constitutional does not warrant this Court's review.

3. Petitioner argues further (Pet. i, 14-16) that the Double Jeopardy Clause, or the rule of statutory construction set out in Blockburger v. United States, 284 U.S. 299, 304 (1932), bars the government from punishing petitioner's conduct under both Section 2119 and Section 924(c). That claim is without merit.

"With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366 (1983). Similarly, the Blockburger rule, which treats two provisions as proscribing the same offense unless "each requires proof of a fact which the other does not," 284 U.S. at 304, is "a rule of statutory construction" under which such provisions will be "construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." Hunter, 459 U.S. at 366, quoting Whalen v. United States, 445 U.S. 684, 691-692 (1980) (emphasis added in Hunter). Thus, even if, as petitioner argues (Pet. 16), Sections 924(c) and 2119 "proscribe the 'same' conduct under Blockburger," separate conviction and punishment for each offense is permissible so long as "a legislature specifically authorize[d] cumulative punishment under [the] two statutes." Hunter, 459 U.S. at 368-369.[4]

---

[4] We note that petitioner's argument under Blockburger (Pet. 16) relies on the language of Section 2119 before its amendment in 1994. Because that amendment substituted a requirement that the defendant act "with the intent to cause death or serious bodily harm" for the previous requirement that the defendant "possess[] a firearm" (see note 3, supra), the question whether, under Blockburger, the older language proscribed the "same offense" as Section 2119 is of no continuing importance.

It is clear that Congress intended to authorize punishment of petitioner's conduct under both Section 2119 and Section 924(c). By its terms, Section 924(c)(1) punishes the use or carrying of a firearm "during and in relation to any crime of violence." It then goes on to provide explicitly that the term of imprisonment it prescribes "shall" be imposed "in addition to the punishment provided for such crime of violence," and that "[n]otwithstanding any other provision of law, * * * the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence * * * in which the firearm was used or carried." There is no dispute that carjacking falls within the definition of "crime of violence" set out in Section 924(c)(3); and there can be no serious dispute that Congress intended Section 924(c) to impose a cumulative punishment. Compare United States v. Gonzalez, 117 S. Ct. 1032, 1035-1038 (1997) (discussing Section 924(c)'s prohibition of concurrent sentencing). Every court of appeals to consider the issue has reached the same conclusion (see United States v. Bishop, 66 F.3d at 573 (citing cases)), and this Court has previously denied review in several cases involving the same contention. See, e.g., Hudson v. United States, 516 S. Ct. 890 (1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1997

IN THE SUPREME COURT OF THE UNITED STATES

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JONES, NATHANIEL
Petitioner

vs.

USA

No. 97-6203

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 18th day of December 1997.

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December 18, 1997

No. 97-6203

Supreme Court, U.S.
FILED
MAY 1 1998

In The

Supreme Court of the United States

October Term, 1997

NATHANIEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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UNITED STATES V. NATHANIEL JONES
NO. 97-6203

Date	Proceedings
	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CALIFORNIA CASE NO. CR-F-92-5264 REC
12/30/92	Indictment returned.
1/11/93	Arrest of Nathaniel Jones.
1/13/93	Initial appearance of Nathaniel Jones; arraignment and appointment of counsel.
7/27/93	Jury selected and sworn. Evidence commences.
7/29/93	Jury returns a guilty verdict on Counts 1 and 2.
12/13/93	Sentencing hearing held; sentence imposed.
12/14/93	Judgment entered. Imprisonment for a term of 360 months; $100 special assessment; supervised release for a term of 5 years; $2,120 restitution.
12/23/93	Notice of Appeal filed to United States Court of Appeals for the Ninth Circuit.
	UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CASE NO. 93-10779
4/12/94	Appellant's Opening Brief and Excerpts of Record Filed.

5/27/94	Appellee's Brief filed.
6/13/94	Appellant's Reply Brief filed.
12/12/94	Oral Argument.
1/10/95	Order issued directing parties to file simultaneous supplemental briefs addressing whether the 25 year statutory maximum under 18 U.S.C. § 2119(2) applies and whether the district court could properly depart upward to reach a total maximum sentence for defendants of 30 years on the basis of United States Sentencing Guideline § 2K2.4 alone.
1/27/95	Appellee's Supplemental Brief filed.
1/30/95	Appellant's Supplemental Brief filed.
7/6/95	Opinion filed by 9th Circuit; Affirming in part, Reversing in part, and Remanding to the District Court. Judgment filed and entered.
8/29/95	Mandate issued.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CALIFORNIA CASE NO. CR-F-92-5264 REC

11/8/95	District Court issues order to vacate Judgment and matter set for resentencing.
3/25/96/	Resentencing hearing. Sentence imposed.

3/27/96	Amended Judgment entered. Imprisonment for a term of 300 months; $100 special assessment; supervised release for a term of 5 years; $2,120 restitution.
4/4/96	Notice of Appeal filed to the United States Court of Appeals for the Ninth Circuit.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CASE NO. 96-10179

7/19/96	Appellant's Opening Brief filed.
8/23/96	Appellees's Brief filed.
4/21/97	Order filed submitting case on briefs without oral argument.
6/27/97	Memorandum Opinion entered affirming judgment of the District Court.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DONOVAN D. OLIVER, NATHANIEL JONES, and DARRYL MCMILLAN, Defendants.	CR. NO. CR-F 92-5264-REC VIOLATIONS: 18 U.S.C. § 2119 – Carjacking; 18 U.S.C. § 924(c)(1) – Use of a Firearm During and In Relation to a Crime of Violence

INDICTMENT

COUNT ONE: [18 U.S.C. § 2119 – Carjacking; 18 U.S.C. § 2 – Aiding and Abetting]

The Grand Jury charges: T H A T

DONOVAN D. OLIVER,
NATHANIEL JONES and
DARRYL MCMILLAN,

defendants herein, on or about December 7, 1992, in the County of Kern, State and Eastern District of California, while possessing a firearm, to wit: a .45 caliber Volunteer Enterprises semi-automatic rifle, serial number 11394, did take a motor vehicle, to wit: a 1987 Honda Accord, California license number 2 EWB936, vehicle identification number JHMCA5634HC078962, that had been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force, violence and intimidation, in violation of Title 18, United States Code, Sections 2119 and 2.

COUNT TWO: [18 U.S.C. § 924(c)(1) – Use of a Firearm During and In Relation to a Crime of Violence; 18 U.S.C. § 2 – Aiding and Abetting]

The Grand Jury further charges: T H A T

DONOVAN D. OLIVER,
NATHANIEL JONES and
DARRYL MCMILLAN,

defendants herein, on or about December 7, 1992, in the County of Kern, State and Eastern District of California, did knowingly use and carry a firearm, to wit: a .45 caliber Volunteer Enterprises semi-automatic rifle, serial number 11394, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, to wit, carjacking as alleged in Count One above, in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

A TRUE BILL.

/s/ Illegible
FOREPERSON

/s/ George L. O'Connell
GEORGE L. O'CONNELL
United States Attorney

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	Case No. CRF 92-5264-REC
Plaintiff,	Fresno, California Wednesday, January 13, 1993
vs.	
NATHANIEL JONES,	Arraignment
Defendant.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DENNIS L. BECK
UNITED STATES MAGISTRATE JUDGE

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[p. 1] FRESNO, CALIFORNIA,
WEDNESDAY, JANUARY 13, 1993

THE CLERK: We call CRF 92-5264, USA versus Nathaniel Jones, arraignment and plea.

(Pause)

THE COURT: All right. Is your true name Nathaniel Jones?

MR. JONES: Yeah.

THE COURT: All right. Mr. Jones, you're charges in an indictment filed with this Court with a violation of Title 18, Section 2119, carjacking, and in violation of Title 18, Section 2, aiding and abetting. In other words, it's alleged that you aided and abetted in carjacking.

It's further alleged that you violated Title 18, Section 924(c)(1), and Title 18, Section 2 in that you used a firearm or aided and abetted in the use of a firearm in relation to a crime of violence. This offense is punishable –

MR. HANLY: Fifteen years and two-fifty on count one, with a five year consecutive on count two.

THE COURT: All right. By a crime of up to 15 years – that is a penalty of up to 15 years in custody and/or $250,000 on count one, the carjacking, if convicted on count one. And count two, the use of a firearm or found to, that would be an additional five years consecutive, [p. 2] which would be required to be imposed.

The – you're entitled to remain silent. Anything you say can and will be used against you. You're requesting an attorney be appointed? Do you want an attorney appointed for you?

(No audible response)

THE COURT: I'll appoint the Federal Defender to represent you in this matter. You're entitled to have your attorney present at all proceedings before this Court, Mr. Jones. And you've received a copy of the indictment on behalf of Mr. Jones, Mr. Balazs?

MR. BALAZS: Yes, Your Honor. And Mr. Jones' name is correctly spelled in the indictment and we waive further reading of his statutory and constitutional rights.

THE COURT: All right. Is the Government seeking detention, Mr. Hanly?

MR. HANLY: Yes, Your Honor.

THE COURT: All right.

MR. BALAZS: Your Honor, we waive a detention hearing.

THE COURT: I'm sorry?

MR. BALAZS: We waive the detention hearing.

THE COURT: All right. Do you submit the matter?

MR. BALAZS: Yes, Your Honor.

THE COURT: All right. I've received a verbal [p. 3] report from Pretrial Services indicating that Mr. Jones has a significant prior criminal record, including two convictions – I'm sorry, three convictions for robbery, one conviction for assault with a deadly weapon, and one for possession of rock cocaine for sale.

Further indications are that he was arrested for this offense and it's alleged to have been committed while he was on parole and while he has – was an absconder from parole supervision, and finally that a no-bail parole hold has been lodged against him.

I'll find by a preponderance of the evidence there are no conditions or combination of conditions which will assure his appearance based on the aforestated factors. I also find by clear and convincing evidence that there are no conditions or combination of conditions which will assure the safety of the community and others.

I base this on the fact that he has four prior convictions involving crimes of force or threat of deadly force against the person of others, that he – this offense was

alleged to have involved a threat of force against others in a violent – is a violent crime, and that he committed this offense – or allegedly committed this offense while on parole.

I will order him detained on that basis as well and set the matter for status conference – is the 19th too [p. 4] soon?

MR. BALAZS: That's fine, Your Honor.

MR. HANLY: We have two other defendants who are coming up from Bakersfield –

THE COURT: Twenty-fifth?

MR. HANLY: – in this same – we could do 25th. That might give us more time to –

THE COURT: Is that agreeable?

MR. HANLY: – get them up here.

MR. BALAZS: That's fine, Your Honor.

THE COURT: All right. I'll order the matter set for status conference before Judge Coyle in courtroom one on Monday, January 25th at 9:00 a.m.

MR. HANLY: Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Jones.

(Whereupon, the proceedings in the above-entitled cause were concluded.)

* * *

United States District Court
for the Eastern District of California

JURY INSTRUCTION

(Caption Omitted In Printing)

ELEMENTS OF THE OFFENSE

The defendants are charged in Count 1 of the indictment with carjacking in violation of Section 2119, Title 18 of the United States Code. That section provides, in part, that: Whoever, possessing a firearm, takes a motor vehicle that has been transported, shipped, or received in interstate commerce or foreign commerce, from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall be guilty of an offense against the United States.

As indicated by this section, in order for the defendants to be found guilty of this charge, the Government must prove each of the following elements beyond a reasonable doubt: First, while possessing a firearm, defendants took a motor vehicle. Second, the motor vehicle had been transported, shipped or received in interstate or foreign commerce. And third, the defendants took the vehicle by force and violence or by intimidation.

[*U.S. v. Nathaniel Jones*, CR-F-92-5264 REC, Reporter's Transcript, Jury Trial, July 28, 1993, pp. 533:19-25, 534: 11-13]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]	)	No. CR-F-92-5264
	)	SENTENCING ORDER
	)	

At their jury trial on July 29, 1993, defendants were found guilty of carjacking and use of a firearm (45 caliber semi-automatic rifle) during and in relation to a crime of violence. Evidence presented at trial showed that defendants accosted two men in a blue Honda, searched their pockets, and stole their money. Victim Muthanna was held at gunpoint by defendant Oliver. Defendant Jones drove Victim Mardaie away in the Honda as he searched the second victim for more money. They went about a block, driving slowly, before Defendant Jones pushed Mr. Mardaie out of the car.

Meanwhile, as Victim Muthanna tried to get up off the ground, defendant Oliver fired one round at close range, causing Mr. Muthanna to fall back on the ground. Defendant Oliver then stuck the barrel of the rifle into Mr. Muthanna's ear and slapped and kicked him on the left side of his face and head. The defendants attempted to flee, but were apprehended by law enforcement officials. In trying to evade apprehension, defendant Jones crashed the Honda, causing approximately $2,000 in damage. Victim Muthanna's ear swelled and bled, and was very painful for several days. He may have suffered permanent hearing loss. Understandably, both victims were traumatized by the incident.

1. Statutory Maximum

The "carjacking statute" under which defendants were convicted provides:

> Whoever, possessing a firearm . . . takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall —
>
> (1) be fined under this title or imprisoned not more than 15 years, or both
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

18 U.S.C. § 2119.

Defendants claim that "serious bodily injury"[1] is an element of the offense and must be pleaded by the government and proven at trial in order for the higher statutory maximum of twenty-five years to apply. Failing that proof, defendants assert that this court may not sentence

[1] "The term 'serious bodily injury' means bodily injury which involves – A) a substantial risk of death; B) extreme physical pain; C) protracted and obvious disfigurement; or D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and the term 'bodily injury' means – A) a cut, abrasion, bruise, burn, or disfigurement; B) physical pain; C) illness; D) impairment of the function of a bodily ember [sic], organ, or mental faculty; or E) any other injury to the body, no matter how temporary." 18 U.S.C. § 1365.

defendants to more than fifteen years on Count One. In essence, defendant claims that 18 U.S.C. § 2119(1), 18 U.S.C. § 2119(2), and 18 U.S.C. § 2119(3) are all separate offenses.

This court finds, however, that carjacking is a single offense defined in Section 2119 and that sections (1) through (3) are merely sentencing provisions to be applied by the district court at sentencing. Due to the newness of the carjacking statute, there is no law directly on point. Thus, this court must look to analogous cases in which a statute specified different statutory maximums for varying degrees of the underlying offense. In *United States v. Young*, 936 F.2d 1050 (9th Cir. 1991), the Ninth Circuit considered whether the dangerous or deadly weapons provision of 18 U.S.C. § 111 constituted a separate element or whether this provision was simply a "sentence enhancement." After analyzing the rationale of *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), the Ninth Circuit determined that its task was twofold. First, the court must determine whether Congress intended the provision to be a separate offense. *Young*. If Congress instead intended the deadly weapon provision as a sentence enhancement factor, then the court must determine whether constitutional considerations mandate that the provision be read as a separate offense, contrary to Congress' intent. *Id.* at 1054.

The Ninth Circuit examined the language of the statute; it noted that the provision was not "structurally separated" from the rest of the section. *Id.; contrast United States v. Medina, supra* (statutory sections referenced each other and were separately labelled). Similarly, the carjacking statute at issue in the case at bar includes separately

numbered provisions, but all follow the work "shall" and are not drafted as "stand-alone" offenses. *See Young*. Instead, as in *Young*, the provision at issue "incorporates the predicate acts by reference rather than affirmatively setting forth any specific elements." *Young*, 936 F.2d at 1054. *See United States v. Normandeau*, 800 F.2d 953 (9th Cir. 1986) (deciding that the quantity of drugs involved in offense is relevant only for sentencing enhancement; decision based in part on placement of penalties in a separate statutory provision and the fact that existence of drugs had already been proven at trial).

The court in *Young* went on to hold the deadly weapon sentence enhancement to be constitutional because the provision did not contain any impermissible presumptions and because it addressed the existence of a factor which is commonly considered at sentencing. Similárly the presence of serious bodily injury as a result of defendants' conduct is a commonly considered factor at sentencing.

II. Defendant Jones

The presentence report recommends a total offense level of 30 calculated by using 20 as the base offense level, adding 2 for robbery by intimidation pursuant to USSG § 2B2.1(b)(1)(B), 4 for serious bodily injury to Victim Muthanna, and adding 4 for Abduction to Facilitate Crime. The report recommends a criminal history category of VI for defendant Jones (13 criminal history points). This results in a guideline range of 168 to 210 months for Count One (carjacking) and a mandatory consecutive 60 months for Count Two (Use of a Firearm).

The guideline computation, when combined with the mandatory five years for Count Two, produces a total maximum penalty which is *less than* the maximum of the guideline range had there not been a conviction for Count Two. This anachronism results because, had there been no conviction for Count Two, the government could have asked for a seven level enhancement. USSG § 2K2.4, Application Note Two, states:

> an upward departure may be warranted so that the conviction under [Count Two – Use of a Firearm] does not result in a decrease of the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been [Count Two – Use of a Firearm].

USSG § 2K2.4, comment (n.2).

This court will upward departure on Count One and impose the mandatory sentence of Count Two for a total of 360 months. Upward departure is also based on the severe psychological trauma experienced by both victims, and Victim Muthanna's injury to his ear. For these reasons, the court determines that upward departure is appropriate.

A. Injury to Victim Muthanna

Defendant Jones also disputes that the events of the carjacking were the cause of Victim Muthanna's injury. Medical reports show that in March of 1992, after an automobile accident, Mr. Muthanna had undamaged eardrums. In January, 1993, forty-one days after the offense

occurred, the injury was discovered. Dr. Robert Downie, supervising physician, stated that the injury to the eardrum occurred at least one month prior to the examination and could have been caused by a slap to the face. Defendant Jones contests Dr. Downie's medical expertise and his conclusions and asserts an independent examination is necessary. The court rejects this argument.

Finally, Defendant Jones contests the diagnosis of Victim Muthanna's injuries as "chronic." Defendant states that a perforated eardrum *can* be treated by surgery and *can* heal. Neither argument is availing, as the definition of serious bodily injury, as defined in USSG § 1B1.1(j), is satisfied by Mr. Muthanna's pain and hearing loss.[2]

B. Abduction of Individual

Defendant Jones contests the four level enhancement under USSG § 2B3.1(b)(4)(A) for abduction of individual to facilitate an offense. Defendant maintains that although Victim Mardaie was in the car when Defendant Jones drove it away, there was no evidence that the victim's presence facilitated commission of the offenses in any way.

For Victim Mardaie to have been "abducted" within the meaning of the Guidelines, he must have been

[2] The Guidelines define "serious bodily injury" as "injury involving extreme pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. As used in the guidelines, the definition of this term is somewhat different than that used in various statutes." USSG § 1B1.1(j).

"forced to accompany an offender to a different location." USSG § 1B1.1, comment 1(a). Clearly, that requirement is satisfied, even if the different location was mere feet from where defendant Jones initially began. The evidence at trial indicated that defendant Jones continued to search Victim Mardaie for money while he was abducting him. Although not as dramatic as using a witness as a human shield to facilitate robbery or escape, such asportation nonetheless qualifies for the enhancement. The commentary simply states, "The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location." USSG § 2B3.1, comment (backg'd).[3]

C. Acceptance of Responsibility

Defendant Jones asserts that his statement to the probation officer entitles him to a two level adjustment for acceptance of responsibility as set forth in USSG § 3E1.1(a). Defendant Jones stated that he had been drinking all day, that he and his co-defendants took his sister's Cadillac to go to the liquor store, and that he went off to a field to relieve himself. When he returned, he saw that Oliver was pointing a gun in the direction of the victims. He told probation officer that he became scared, so he jumped in the Honda to get away.

[3] Due to this court's holding on this issue, it is unnecessary to rule on the government's argument that Defendant Oliver "abducted" Victim Muthanna from the car by moving him several feet and holding him at gunpoint.

The Guidelines indicate that to obtain a reduction of acceptance of responsibility, the defendant should truthfully admit the conduct comprising the offense of conviction, admit or *not deny* any relevant conduct. USSG § 3E1.1, comment. Mr. Jones' version falls far short of the Guidelines' definition of "acceptance of responsibility."

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DONOVAN DWAYNE OLIVER; DARRYL LEE MCMILLAN; NATHANIEL JONES, *Defendants-Appellants.*	Nos. 93-10770 93-10775 93-10779 D.C. No. CR-92-05264-REC OPINION

Appeals from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief Judge, Presiding

Argued and Submitted
December 12, 1994* – San Francisco, California

Filed July 6, 1995

Before: Procter Hug, Jr., William C. Canby, Jr.
and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

OPINION

HAWKINS, Circuit Judge:

Defendants Donovan Dwayne Oliver, Darryl Lee McMillan, and Nathaniel Jones appeal their convictions and sentences for carjacking/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 2119, and using a firearm

* Submitted on the briefs as to No. 93-10775.

during a crime of violence/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c). We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, and vacate and remand in part.

I.

Background

The evidence at trial disclosed the following facts: On December 7, 1992, Oliver, Jones and McMillan drove to a liquor store in Bakersfield, California. In the liquor store parking lot, they approached Ali Nassar Mutanna and Abdullah Mardaie, who were in Mardaie's parked car. After ordering Mutanna and Mardaie out of the car, Oliver held them at gunpoint. Oliver stuck the barrel of his firearm into Mutanna's left ear and held it there to ensure that Mutanna would not move, causing Mutanna's ear to bleed profusely. Meanwhile, Jones and McMillan searched Mutanna's and Mardaie's pockets. Oliver then forced Mutanna behind the liquor store, ordered him to lie on the ground, and struck him in the head while he was lying there. Oliver told Mutanna that Oliver would kill him if he moved. Oliver then got into Jones' car, which was being driven by McMillan, and fired a shot as they drove away.

Jones had forced Mardaie into Mutanna's car, and Jones followed Oliver and McMillan as they left the scene. After they travelled a short distance, Jones ordered Mardaie out of the car.

After defendants left, Mutanna flagged down a police car. Police officers located Mutanna's car a few blocks away from the liquor store. Jones fled in Mutanna's car

when he noticed the police car approaching. After a short car chase, Jones crashed Mutanna's car and was apprehended. Jones' car was also located nearby, with the gun used by Oliver in the back seat. Oliver and McMillan were arrested shortly thereafter.

Defendants were indicted on December 30, 1992, with one count of carjacking/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 2119, and one count of using a firearm during a crime of violence/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c). On July 29, 1993, defendants were convicted by a jury on all counts. Defendants were sentenced under the 25-year (300 months) statutory maximum set forth in § 2119(2), because Mutanna suffered serious bodily injury during the crime. Defendants were each sentenced to a total of 300 months on the carjacking count and a consecutive 60 months for the use of a weapon.

Defendants timely appealed their sentences and convictions on December 17, 1993.

II.

Grand Jury Indictment

Defendants Oliver and McMillan first argue that the district court lacked jurisdiction because the indictment against them was returned in a courtroom closed to the public. *See* Rule 6(f), Fed.R.Crim.P. ("indictment[s] shall be returned by the grand jury to a federal magistrate in open court"). "[E]rrors in the grand jury indictment procedure are subject to harmless error analysis unless 'the structural protections of the grand jury have been compromised as to render the proceedings fundamentally

unfair.' " *United States v. Lennick*, 18 F.3d 814, 817 (9th Cir. 1994) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-57 (1988)). Because defendants do not claim prejudice as a result of the indictment being returned in a closed courtroom, any defect was harmless. In any event, defendants did not raise this issue before the district court, so they waived the right to raise the issue on appeal. *United States v. Kahlon*, 38 F.3d 467, 469 (9th Cir. 1994) (objection based upon the failure to return an indictment in open court is not jurisdictional and is waived if not raised prior to trial); Rule 12(b)(1), Fed. R. Crim. P.

III.

Commerce Clause

Defendants contend that Congress exceeded its power under the Commerce Clause in enacting the carjacking statute, because carjacking is not sufficiently related to interstate commerce. We recently rejected this argument in *United States v. Martinez*, 49 F.3d 1398, 1400-01 (9th Cir. 1995). In so ruling, we joined with every other circuit court that had addressed the question.

The Supreme Court's recent decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), does not alter our view. In Lopez, the Supreme Court held that Congress exceeded its power under the Commerce Clause when it made it a federal offense for a person to possess a firearm within 1000 feet of a school. *See* 18 U.S.C. § 924(q). The Court noted that "Sec. 922(q) contains no jurisdictional element which would ensure, through a case-by-case inquiry, that

the firearm possession in question affects interstate commerce." *Id.* at at 1631. It also explained that the statute does not seek to protect "an instrumentality of interstate commerce." *Id.* at 1630. Finally, the Court pointed out that there was no showing of a substantial effect of the prohibited activity on interstate commerce, and Congress had made no findings that there was such an effect. *Id.* at 1631-32.

The carjacking statute has a very different background. First, it applies only to the forcible taking of a car "that has been transported, shipped, or received in interstate or foreign commerce." 18 U.S.C. § 2119. *See United States v. Hanna*, No. 94-10131, Slip Op. at 5965-66 & n. 2 (9th Cir., May 31, 1995) (holding that "[18 U.S.C. § 922(g)'s] requirement that the firearm have [sic] been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause"). Second, cars are themselves instrumentalities of commerce, which Congress may protect. *See United States v. Watson*, 815 F. Supp. 827, 831 (E.D. Pa. 1993) (citing *United States v. Perez*, 402 U.S. 146, 150 (1971), and upholding § 2119 under the Commerce Clause because it protects an instrumentality of commerce).

Lastly, we note that Congress was not silent regarding the effect of carjacking on interstate commerce. As we stated in *Martinez*, Congress relied on, among other things, "the emergence of carjacking as a 'high-growth industry' that involves taking stolen vehicles to different states to retitle, exporting vehicles abroad, or selling cars to 'chop shops' to distribute various auto parts for sale." *Martinez*, 49 F.3d at 1400 n.2 (citing legislative history).

That Congress was addressing economic evils of an interstate nature differentiates the carjacking statute from the firearms statute invalidated in *Lopez*. "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 115 S. Ct. at 1634. Carjacking, on the other hand, is exactly that sort of economic activity, as Congress clearly concluded. We accept that conclusion, and accordingly reject the defendants' contention.

IV.

Equal Protection

Having complained that carjacking does not impact interstate commerce, defendants Oliver and McMillan next argue that the carjacking statute violates equal protection because it only prohibits the theft of cars previously "transported, shipped, or received" in interstate commerce, and does not prohibit the theft of cars that have not been "transported, shipped or received" in interstate commerce. Because defendants did not raise this issue before the district court, we decline to address it on appeal. *See United States v. Cupa-Guillen*, 34 F.3d 860, 863-64 (9th Cir. 1994) (failure to present equal protection challenge to district court constitutes waiver of the claim).

V.

Double Jeopardy

Defendants contend that their convictions under § 2119 and § 924(c) violate the Double Jeopardy Clause

because both statutes punish the same conduct. This argument is also foreclosed by our recent opinion in *United States v. Martinez*, 49 F.3d at 1402.

VI.

Sufficiency of Evidence

Defendant Jones argues that there was insufficient evidence to support his carjacking conviction under the aiding and abetting theory. Although Jones moved for judgment of acquittal at the close of the government's case, he did not renew the motion at the close of all evidence. We therefore review for plain error. *United States v. Ramirez*, 880 F.2d 236, 238 (9th Cir. 1989).

Relying on *United States v. Dinkane*, 17 F.3d 1192 (9th Cir. 1992), Jones contends that he was not properly convicted of carjacking because there was no evidence that he possessed a firearm. *Dinkane* involved a conviction for armed bank robbery under 18 U.S.C. § 2113(d), an aggravated form of bank robbery under 18 U.S.C. § 2113(a). We noted that to sustain a § 2113(d) conviction for an aider and abettor, the government must show not only that the defendant knowingly and intentionally aided the act of bank robbery, but also the commission of the aggravating element. *Id.* at 1197. We therefore concluded that the defendant get-away driver could not be convicted of armed bank robbery under an aiding and abetting theory where there was no evidence that he knew – before or during the bank robbery – that the robbers had and intended to use weapons. *Id.* at 1198.

Contrary to Jones' contention, *Dikane* [sic] does not require that the government prove that he actually possessed the firearm. *Dikane* [sic] only requires proof that Jones knew that a co-defendant had and intended to use the firearm during a carjacking, and intended to aid in that endeavor. There was ample evidence of this.

The evidence demonstrated that, on the evening of the carjacking, Jones, Oliver and McMillan drove to a liquor store in Jones' car. Oliver testified that when he got into Jones' car, he noticed a gun on the floor of the back seat. Mutanna testified that when defendants approached him in the liquor store parking lot, he could see that Oliver was carrying a gun. Oliver held Mutanna and Mardaie at gunpoint, while Jones and McMillan rifled their pockets. Oliver also used his gun to keep Mutanna behind the store, and fired a shot from Jones' car, as Jones escaped in the Mutanna's car. A reasonable jury could have easily concluded from these facts that Jones knew Oliver had a firearm, that Jones knew Oliver intended to use the firearm during the carjacking, and that Jones intended to and did aid in that endeavor. Jones' conviction was not plain error.

VII.

Voluntary Intoxication Evidence

Defendant Oliver takes issue with the district court's refusal to allow evidence of his voluntary intoxication. We review the exclusion of evidence for abuse of discretion. *United States v. Rahm*, 996 F.2d 1405, 1410 (9th Cir. 1993).

As the district court correctly concluded, carjacking is a general intent crime, *Martinez*, 49 F.3d at 1401, and voluntary intoxication is not a defense to general intent crimes, *see, e.g., United States v. Sneezer*, 983 F.2d 920, 922 (9th Cir. 1992) (voluntary intoxication may be a defense to a specific intent crime, but is not a defense to a general intent crime). Nevertheless, Oliver argues that *United States v. Hartfield*, 513 F.2d 254 (9th Cir. 1975), requires that he be allowed to present the evidence. In *Hartfield*, we held that evidence of drug intoxication was admissible because it related to the defendant's sanity during the time of the offense. *Id.* at 259-60.

Hartfield is not applicable to this case. First, Oliver did not present an insanity defense. Moreover, unlike the proffered testimony in *Hartfield*, Oliver's testimony would only show that he drank heavily on the day of the carjacking. This would not necessarily show that Oliver was incapable of committing the crime charged or appreciating the wrongfulness of his acts. Accordingly, we find no abuse of discretion in the district court's refusal to allow evidence of Oliver's voluntary intoxication.

VIII.

Serious Bodily Injury

Defendants also argue that "serious bodily injury" as set forth in § 2119(2) is an element of the carjacking offense which must be pleaded in the indictment and proved beyond a reasonable doubt at trial. Defendants point out that it was not until the sentencing phase that they became aware that there would be a contention that the case involved serious bodily injury for purposes of

§ 2119(2). The district court concluded that serious bodily injury is a factor which it was free to consider in sentencing defendants. We agree with the district court.

The Supreme Court has emphasized that the key to distinguishing between elements of an offense and sentencing factors is the legislature's definition of the elements of the offense. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986). We therefore must look to the plain language and structure of the statute. *United States v. Young*, 936 F.2d 1050, 1054 (9th Cir. 1991). The carjacking statute, 18 U.S.C. § 2119, reads as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

In *United States v. Williams*, ___ F.3d ___, 1995 WL 236715. *7 (11th Cir. 1995), the Eleventh Circuit concluded that "Congress[ ] inten[ded] that subparagraphs (2) and (3) be treated as sentencing enhancement features, and not elements of the offense." According to the Eleventh Circuit, the natural reading of the text – in which the crime of carjacking is defined in the first paragraph and

the subparagraphs simply set forth different degrees of sentencing – suggests that the subparagraphs are sentencing provisions. *Id.* We agree with the Eleventh Circuit and conclude that the serious bodily injury and death language in § 2119 exist for sentence enhancement purposes. *See also United States v. Ryan*, 9 F.3d 660, 669 (8th Cir. 1993), *modified on other grounds*, 41 F.3d 361 (8th Cir. 1994) (en banc) (concluding that "if death results" provision of federal arson statute, 18 U.S.C. § 844(i), is sentencing enhancer), *cert. denied*, ___ S. Ct. ___, 1995 WL 50599 (1995); *United States v. Patterson*, 38 F.3d 139, 143-44 (4th Cir. 1994) (concluding that "if death or serious bodily injury results" language in 21 U.S.C. § 841(b)(1)(C) is sentencing enhancement), *cert. denied*, ___ S. Ct. ___, 1995 WL 50065 (1995). The plain text of the statute establishes one offense, as defined in the first main paragraph. That definition of the offense is set apart by a comma, followed by the word "shall" and then three sentencing possibilities. This does not establish three separate, substantive offenses.

Our decision in *United States v. Young*, 936 F.2d 1050 (9th Cir. 1991), is instructive. In that case, we determined that the weapon provision of 18 U.S.C. § 111 is a sentencing factor, rather than an element of the crime of assaulting a federal officer. The statute under which the defendant was convicted read as follows:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than

> $5,000 or imprisoned not more than three (3) years, or both.
>
> Whoever, in the commission of such acts uses a deadly or dangerous weapon shall be fined not more than ten (10) years, or both.

18 U.S.C. § 111 (amended 1988). In concluding that Congress intended the weapon provision to be a sentencing factor, we noted that it was not "structurally separated from the rest of the section, indicating that the section contains only one substantive offense." *Young*, 936 F.2d at 1054. Moreover, the "weapon provision [was] not drafted as a stand-alone offense; it incorporate[d] the predicate acts by reference rather than affirmatively setting forth any specific elements." *Id.*; *see also Ryan*, 9 F.3d at 667 (use of semi-colons and the conjunction "and," as well as conclusion that latter sections of arson statute regarding resulting bodily injury and death could not stand alone, suggest treatment as a single offense).

Similarly, Congress did not enact § 2119 and its subparts in "structurally separate" provisions. It did not redefine the essential elements of carjacking in subparagraphs (1), (2) or (3), and those provisions could not stand alone, independent of the main paragraph. These factors lead to the conclusion that § 2119 sets forth one offense, with several possible penalties.

Defendants argue that Young is distinguishable because, in a subsequent amendment, the weapon provision of § 111 was specifically labelled "Enhanced Penalty," and therefore Congressional intent is clear. It is true that in *Young* we found this subsequent amendment to

have "persuasive value." *Young*, 936 F.2d at 1054.[1] But we have similar persuasive evidence of congressional intent in this case. Section 2119 was adopted as part of the overall "Anti-Car Theft Act of 1992" (the "Act"), enacted at a time when carjacking crimes were increasing at an alarming rate. *See* Public Law 102-519, 102nd Congress, 106 STAT 3384 (1992). In the Act, § 2119 and its subparagraphs come directly under the title, "Tougher Law Enforcement Against Auto Theft," and the subtitle, "*Enhanced Penalties* for Auto Theft." *Id.* (emphasis added). Clearly the title, and undoubtedly the subtitle, suggest an intent that § 2119 set forth enhanced penalties. Other portions of the legislative history suggest the same conclusion. *See, e.g.*, H.R.Rep. No. 102-851(II), 102nd Cong., 2d. Sess. 14, *reprinted in*, 1992 U.S.C.C.A.N. 2847 ("the Committee adopted an amendment . . . increasing the maximum prison term for carjacking to 25 years, instead of 15 years . . . when carjacking results in bodily injury. If death results, the penalty could be life in prison and a fine."); H.R.Rep. No. 102-851(II), 102nd Cong., 2d. Sess. 30, 1992 U.S.C.C.A.N. 2863 ("H.R. 4542 also would provide for new and enhanced penalties (including fines) for certain crimes, including armed robberies of motor vehicles . . . "); H.R.Rep. No. 102-851(II), 102nd Cong., 2d. Sess. 61, 1992 U.S.C.C.A.N. 2894 ("The Committee's substitute also increased the penalty for 'carjackings' when serious bodily injury occurs over and above the penalties in the bill reported by the Judiciary Committee."). In fact,

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[1] Although we recognized that "the view of a later Congress does not establish definitely the meaning of an earlier enactment." *Id.*

nothing in our review of the Act or its legislative history even remotely indicates that Congress intended that serious bodily injury and death be additional carjacking elements which must be proved beyond a reasonable doubt at trial.

We also reject defendants' contention that the carjacking statute is similar to the statute construed in *United States v. Gonzalez-Medina*, 976 F.2d 570 (9th Cir. 1992). In *Gonzalez-Medina*, we concluded that the provisions of 8 U.S.C. § 1326,[2] dealing with the deportation of

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[2] The statute provides in relevant part:

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisonment not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of a felony

aliens, comprised two separate crimes, with separate elements. Unlike the subparagraphs of the carjacking statute, § 1326(a) and (b) stand alone, each with its own elements and sentence provisions. Subsection (a) states that it is "subject to subsection (b);" while subsection (b) contains the language "[n]otwithstanding subsection (a)." The structure and language of § 1326 is very different from that of the carjacking statute; *Gonzalez-Medina* is not controlling.

While defendants were not informed through the indictment or at arraignment that they were facing the 25-year maximum, this omission does not amount to a due process violation. *See, e.g., Young*, 936 F.2d at 1053 (indictment need not plead sentencing factor); *LaMere v. Risley*, 827 F.2d 622, 624 (9th Cir. 1987) (notice in the information that government will seek sentence enhancement not necessary); *United States v. Dunn*, 946 F.2d 615, 619 (9th Cir.) (prior violent felonies used for sentence enhancement need not be charged in indictment or proved at trial), *cert. denied*, 502 U.S. 950 (1991). The evidence at trial suggested that Mutanna suffered injury. The probation department reported in the presentence

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(other than an aggravated felony), such alien shall be fined under Title 18, imprisonment not more than 15 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 15 years, or both.

report that Mutanna suffered a perforated eardrum, causing numbness and some hearing loss, and defendants were given medical reports on the condition. Defendants concede that they were given an opportunity to contest the issue at sentencing. We note that defendants have never demonstrated that the information in the presentence report was inaccurate, or that the district court erred in determining that Mutanna suffered serious bodily injury. Having concluded that serious bodily injury is not an element of the offense, we are compelled to find that defendants received sufficient process for purposes of the Fifth Amendment. *See, e.g., West*, 826 F.2d at 912 (due process satisfied where prior convictions used for sentence enhancement were detailed in presentence report, defendant did not challenge prior convictions, and defendant did not show information in presentence report was materially false); *United States v. McDougherty*, 920 F.2d 569, 575 (9th Cir. 1990) (due process satisfied where sentencing enhancement factors are alleged in presentence report and proven by a preponderance of evidence), *cert. denied*, 499 U.S. 911 (1991).

IX.

Sentencing Guideline Issues

Defendants contend that the district court committed various sentencing errors. We review the district court's interpretation and application of the United States Sentencing Guidelines ("U.S.S.G.") de novo, while we review the district court's factual findings in the sentencing phase for clear error. *United States v. Buenrostro-Torres*, 24 F.3d 1173, 1174 (9th Cir. 1994).

A. Abduction

In sentencing defendants, the district court applied U.S.S.G. § 2B3.1(b)(4)(A), which provides for a four-level increase "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." "Abducted" is defined as "forced to accompany an offender to a different location." U.S.S.G. § 1B1.1. Defendants argue that although Mardaie was in the stolen car when Jones drove it away, there was no indication that this facilitated either the offense or the escape. We disagree.

There can be no dispute that Mardaie was forced to accompany Jones as he drove the stolen car away from the crime scene. Jones followed Oliver and McMillan, who left the scene in Jones' car. The evidence easily supports the conclusion that the abduction made a quicker get-away possible and prevented Mardaie from crying out or calling the police. Furthermore, on this record, it is entirely possible that Jones thought he was taking the only living witness away from the crime. The district court's conclusion that Mardaie's abduction facilitated defendants' escape was not clear error.[3] We also reject Oliver's and McMillan's suggestion that the district court failed to make the requisite findings regarding their role in the abduction under U.S.S.G. § 1B1.3. That section

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[3] The district court also concluded that Mardaie's abduction facilitated the offense. Because the district court soundly concluded that the abduction facilitated defendants' escape, we need not reach that issue. *See United States v. Hernandez-Valenzuela*, 932 F.2d 803, 805 (9th Cir. 1991) (where the district court gives two alternative grounds for enhancement, so long as one ground is proper, no remand is necessary).

provides that a defendant may be accountable for the conduct of others that was "in furtherance of the jointly undertaken criminal activity" and "reasonably foreseeable in connection with that criminal activity." *See* U.S.S.G. § 1B1.3, comment. (n. 2). We think it is obvious from the district court's rulings that he found the abduction to be in furtherance of the carjacking and foreseeable to defendants. And, as the discussion above demonstrates, this conclusion was fully supported by the evidence. *See United States v. Slater*, 971 F.2d 626, 633 (9th Cir. 1992) (district court need only make generalized statement of its reasons for enhancement, so appellate court may tie sentencing decision to a factual basis in the record).

B. Obstruction of Justice

At the sentencing hearing, the district court applied a two-level adjustment to defendant Oliver's sentence concluding that he testified untruthfully at trial. After Oliver filed his notice of appeal, however, the district court issued a Sentencing Order in which it retracted the obstruction of justice enhancement for Oliver. The district court stated that Oliver's testimony at trial not rise to a level warranting enhancement. Although the district court determined that obstruction of justice was not applicable, it did not recalculate Oliver's sentence without the two-level adjustment. Oliver argues that in light of this discrepancy, his sentence should be remanded, and we agree.

The commentary to § 3C1.1 provides that "testimony and statements should be evaluated in a light most favorable to the defendant." U.S.S.G. § 3C1.1, comment. (n. 1). We give great weight to the district court's assessment of Oliver's testimony. *See United States v. Barbosa*, 906 F.2d 1366, 1370 (9th Cir. 1990) (appellate court should give "due regard to the opportunity of the district court to judge the credibility of the witnesses"). Because the district court indicated that application of § 3C1.1 was not warranted, we remand this case for recalculation of defendant Oliver's sentence without the two-level adjustment.

C. Criminal History

Upon remand, the district court is also instructed to reconsider the appropriate Criminal History Category for Oliver. At sentencing, the district court adopted the presentence report finding that Oliver had nine criminal history points and a Criminal History Category of IV. However, the district court's subsequent Sentencing Order suggested that Oliver had only six criminal history points, which would be a Criminal History Category of III. Although this discrepancy may have been nothing more than a clerical error, the district court should clarify the appropriate Criminal History Category and resulting sentence on remand.

D. Upward Departures

Finally, defendants argue that the district court erred in departing upward on their sentences. The district court relied on the presentence reports, which recommended an

upward departure pursuant to U.S.S.G. § 2K2.4 to a total term of 360 months.[4] However, the probation department, and thus the district court, erred in applying § 2K2.4. Although defendants did not raise the issue before the district court, we address the issue to prevent a miscarriage of justice, and to ensure that defendants' do not serve sentences that exceed the guideline maximum. *See United States v. Young*, 470 U.S. 1, 15 (1985) (plain error doctrine permits the court to correct errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings"); *see also United States v. Agoro*, 996 F.2d 1288, 1291 (1st Cir. 1993) (addressing unpreserved legal claim to prevent defendant from serving sentence exceeding guidelines).

Pursuant to U.S.S.G. § 2B3.1(b)(2)(A), a 7-level enhancement would have normally been applicable to defendants' carjacking sentences because a gun was discharged during the offense. However, because defendants were also convicted of using a firearm under § 924(c), which carries a mandatory consecutive five year sentence, defendants' carjacking sentences were not subject to the 7-level enhancement. *See* U.S.S.G. § 2K2.4, comment. (n. 2). U.S.S.G. § 2K2.4 provides for an upward

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[4] U.S.S.G. § 5K2.3, which provides for departure on the basis of "extreme psychological injury" to the victim, did not factor into the probation department's recommended 360-month sentences. The district court suggested that § 5K2.3 was an additional ground for departure, but did not attribute any specific amount of its departure to that basis. Because the district court adopted the presentence reports, it apparently believed that departure to 360 months was justified under § 2K2.4 alone.

departure in those cases where the guideline range for the underlying offense (without the seven-level enhancement), when combined with the mandatory five-year sentence under § 924(c), produces a total maximum penalty that is less than the maximum of the guideline range that would have been applicable if there was no conviction under § 924(c). The upward departure may not exceed "the maximum of the guideline range that would have resulted had there not been a count of conviction under [Sec. 924(c)]." *Id.*

There is no dispute that defendants' guideline ranges would have been greater without a conviction under § 924(c). While upward departure was therefore appropriate, that departure could not exceed the maximum of the guideline range that would have been applicable without the § 924(c) conviction. In other words, the maximum combined penalty for the underlying carjacking conviction *plus* the § 924(c) conviction could not exceed the maximum penalty available for the carjacking conviction with the seven-level enhancement. For each defendant, the maximum guideline range absent their § 924(c) conviction (and with the 7-level enhancement) was limited to 300 months (25 years) – the statutory maximum penalty for carjacking resulting in serious bodily injury. *See* U.S.S.G. § 5G1.1 (providing that the guideline range is restricted by the statutorily authorized maximum penalty). Therefore, with an upward departure under § 2K2.4, the *total* sentence for each defendant could not exceed 300 months (or 240 months for the carjacking conviction plus consecutive 60 months for the § 924(c) conviction). That is the maximum penalty that would have been applicable "had there not been a count of

conviction under § 924(c)." U.S.S.G. § 2K2.4, comment. (n. 2). Because the district court erred in applying § 2K2.4 to increase defendants' total sentences to 360 months, we vacate and remand for resentencing.

We express no opinion here as to whether, or to what extent, additional departure may be warranted under U.S.S.G. § 5K2.3. Should the district court attribute any amount of departure to § 5K2.3 on remand, it should specify why the psychological injury in this case is more severe than that which would normally occur to a victim of this type of crime. *See* U.S.S.G. § 5K2.3 (departure may be warranted if a victim "suffered psychological injury much more serious than that normally resulting from commission of the offense").

AFFIRMED in part, and VACATED and REMANDED in part.

United States Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

Donovan Dwayne OLIVER; Darryl Lee McMILLAN; Nathaniel JONES, Defendant-Appellants.

Nos. 96-10176, 96-10177, 96-10179.

Submitted April 21, 1997**

Decided June 27, 1997.

Appeal from the United States District Court for the Eastern District of California; No. CR-92-05264-REC; Robert E. Coyle, District Judge, Presiding

Before: HUG, Chief Judge, CANBY and HAWKINS, Circuit Judges.

MEMORANDUM*

Donovan Oliver, Darryl McMillan, and Nathaniel Jones appeal their sentences imposed on resentencing following their convictions for carjacking in violation of 18 U.S.C. § 2119 and for use of a firearm in violation of 18

** The panel finds this case appropriate for submission without argument pursuant to Fed.R.App.P. 34(a) and Ninth Circuit Rule 34-4.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

U.S.C. § 924(c). In a prior appeal, we affirmed defendants' convictions but remanded for resentencing. We now affirm their sentences.

The district court was not required to identify an independent basis for its departures when it resentenced defendants to the maximum sentence allowed - 300 months. Both our earlier opinion in this case, *United States v. Oliver*, 60 F.3d 547, 556 (9th Cir.1995), and U.S.S.G. § 2K2.4 itself, make clear that the district court could rely on this guideline alone to depart upward. Furthermore, the upward departures here were not unreasonable because defendants were sentenced at the top of the guideline ranges that would result absent the § 924(c) convictions.

We also find no merit in Oliver's and McMillan's contention that the district court violated the Ex Post Facto Clause by using the 1993 Guidelines in effect at the time of sentencing, rather than the 1992 Guidelines in effect at the time of their offenses. The Ex Post Facto Clause is violated when a guideline change (1) applies to events before its enactment, and (2) disadvantages the defendant. *United States v. Carson*, 988 F.2d 80, 81-82 (9th Cir.1993). No such violation occurred here, however, because as the government correctly notes, the 1993 Guidelines are actually more favorable to defendants. Under the 1992 Guidelines, the district court would have had to apply a seven-level enhancement for discharge of a firearm. U.S.S.G. § 2B3.1(b)(2)(A) (1992). The 1993 Guidelines, by contrast, forbid such an enhancement under these circumstances, instead authorizing a district court to depart upward to correct any injustice. Even after accounting for the two-point enhancement for

carjacking under the 1993 Guidelines, U.S.S.G. § 2B3.1(b)(1)(B), therefore, defendants' guideline ranges were lower under the 1993 version. Moreover, the upward departure provision did not prejudice the defendants because the district judge made clear that under either set of Guidelines he would sentence the defendants to the 300 months that our remand imposed as an upper limit.

Supreme Court of the United States

JONES, NATHANIEL

v.

UNITED STATES.

No. 97-6203.

March 30, 1998.

The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari is granted.

Supreme Court of the United States

JONES, NATHANIEL

v.

UNITED STATES.

No. 97-6203.

April 6, 1998.

The order entered March 30, 1998, granting a writ of certiorari is amended as follows: 'The writ of certiorari is limited to the following questions: 1. Does 18 U. S. C. §2119(1)-(3) describe sentencing factors or elements of the offense? 2. If 18 U. S. C. §2119(1)-(3) sets forth sentencing factors, is the statute constitutional?'

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(5)

No. 97-6203

In The

Supreme Court of the United States

October Term, 1997

NATHANIEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED

1. Does 18 U.S.C. § 2119(1)-(3) describe sentencing factors or elements of the offense?

2. If 18 U.S.C. § 2119(1)-(3) sets forth sentencing factors, is the statute constitutional?

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Welsh S. White, Fact-Finding And The Death Penalty: The Scope of A Capital Defendant's Right To Jury Trial, 65 Notre Dame Law Review 1, 25-27 (1989) 40

Fed.R.Evid. 1101(d)(3) 11

OPINIONS BELOW

The initial opinion and sentencing order by the district court is unreported. Relevant portions appear in the Joint Appendix at J.A. 11. The published opinion of the court of appeals, filed on July 6, 1995, affirming petitioner's conviction and vacating his sentence, is reported at 60 F.3d 547 (9th Cir. 1995). A copy appears in the Joint Appendix at J.A. 19. The opinion by the district court upon resentencing is unreported. The unpublished memorandum opinion of the court of appeals filed on June 27, 1997, affirming the resentencing order, is noted at 116 F.3d 1487 (9th Cir. 1997) (table). A copy appears in the Joint Appendix at J.A. 41.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 27, 1997. The petition for writ of certiorari was timely filed on September 25, 1997. 28 U.S.C. §2101(c); Supreme Court Rules 13.1 and 13.4. Certiorari was granted on March 30, 1998. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except

in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CARJACKING, TITLE 18 U.S.C. SECTION 2119 (1992):

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

STATEMENT OF THE CASE

The issue in this case is whether a criminal statute, which specifically identifies factual circumstances relating to the commission of the offense, sets forth elements that must be alleged in the indictment and proved

beyond a reasonable doubt at trial, as opposed to factors relevant to sentencing only. Here, petitioner was sentenced for an aggravated crime of carjacking involving "serious bodily injury," even though the indictment and proof at trial pertained only to the elements of simple carjacking. Petitioner had no notice, prior to or at trial, of any allegation that "serious bodily injury" resulted to any person from the offense.

The indictment, filed December 30, 1992, charged petitioner Nathaniel Jones with one count of carjacking, in violation of 18 U.S.C. §2119, and one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §924(c)(1). At the time of the offense, the maximum penalty for carjacking was 15 years imprisonment under section 2119(1), increased to 25 years under section 2119(2) if the offense resulted in "serious bodily injury" as defined in 18 U.S.C. §1365(g)(3),[1] and increased to life imprisonment under section 2119(3) if death resulted from the offense. The indictment did not allege that the offense resulted in "serious bodily injury." J.A. 4-5.

When petitioner was arraigned on the indictment on January 13, 1993, the magistrate judge advised him that the maximum penalty on count one was 15 years imprisonment and the maximum on count two was five

[1] "Serious bodily injury" is defined as injury which involves: "(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. §1365(g)(3).

years. J.A. 7. In the discovery provided by the government before trial, there was information that a victim, Ali Nassar Mutanna, had been hit on the side of the head. However, there was no information to suggest that he or any person had suffered any type of serious injury from the offense, and the government's trial brief did not mention any such injury.[2] C.R. 43.

Jury trial began on July 27, 1993. At trial, the government presented evidence as follows: On December 7, 1992, at approximately 9:45 p.m., petitioner Nathaniel Jones, and co-defendants Donovan Oliver and Darryl McMillan, drove a blue Cadillac to a liquor store in Bakersfield, California. R.T. 457-459. The Cadillac pulled up near the side of the store and parked. Petitioner and Oliver exited the car. R.T. 461-462. The victims, Ali Nassar Mutanna and Abdullah Mardaie, were sitting in Mutanna's tan Honda, which was parked near the side of the store with the engine running. Mutanna saw the two men exit the blue Cadillac and come towards him. One of them, later identified as Oliver, had a gun. R.T. 158, 162-163. Mutanna testified that he was directed to exit the car and was pulled behind the liquor store, where Oliver held a gun on him and robbed him. While Mutanna was on the ground, Oliver hit and kicked Mutanna. R.T. 165. Oliver then entered the back seat of the Cadillac, which was driven by McMillan. R.T. 167.

While Mutanna was behind the liquor store, Mardaie was still inside the tan Honda. He was directed to exit by

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[2] R.T. is the Reporter's Transcript dated July 27-29, 1993. C.R. is the Clerk's Record of the case in the District Court.

one of the men, robbed, and then told to get back in the car. R.T. 388. Immediately after the Cadillac left the liquor store, petitioner got into the tan Honda with Mardaie and drove away. R.T. 168. After driving a short distance, petitioner instructed Mardie to leave the car, which he did. R.T. 390-391. Petitioner was arrested shortly thereafter by officers who had followed the tan Honda. R.T. 171, 309-311. Oliver and McMillan were arrested soon afterwards during a search of the surrounding area. R.T. 296, 361-362. In the blue Cadillac, officers recovered the gun reportedly used by Oliver. R.T. 356.

The government presented no evidence of serious bodily injury at trial. The jury was instructed that to establish carjacking it must find beyond a reasonable doubt that (a) petitioner had taken a motor vehicle while possessing a firearm; (b) the motor vehicle had been transported, stripped, or received in interstate commerce; and (c) the vehicle was taken by force or intimidation. The jury was not instructed to find whether "serious bodily injury" resulted from the carjacking offense. J.A. 10. On July 29, 1993, petitioner was found guilty on both counts of the indictment. C.R. 59.

Petitioner first received notice of the "serious bodily injury" allegation when he received a copy of the draft presentence report several weeks after the trial had concluded. That report indicated that Mutanna had suffered a perforated eardrum, causing numbness and some hearing loss. Petitioner then requested and received from the probation office a copy of medical records relating to the ear injury. At that point, it was more than 12 months after the offense had occurred, and the physician who examined Mutanna was no longer in the area. C.R. 84.

On December 13, 1993, petitioner was sentenced to 25 years on count one and 5 years on count two, to run consecutive to each other, for a total term of imprisonment of 30 years. At sentencing, the district court overruled petitioner's objection to the presentence report's conclusion that Mutanna suffered "serious bodily injury" from the offense.[3] J.A. 12. An appeal of the conviction and sentence was filed. In a published decision, *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995), the Ninth Circuit affirmed petitioner's judgment of conviction, finding that serious bodily injury was only a sentencing factor, but vacated the sentence and remanded to the district court for resentencing because of an error under the sentencing guidelines. J.A. 19. Upon resentencing, the court imposed a term of imprisonment of 20 years on Count One and a term of 5 years on Count Two, to run consecutively, for a total sentence of 25 years. On appeal from the district court's re-sentencing order, the Ninth Circuit affirmed the convictions and sentence on June 27, 1997. J.A. 41.

SUMMARY OF ARGUMENT

Under 18 U.S.C. §2119(1), carjacking is subject to a maximum penalty of 15 years imprisonment. Under 18 U.S.C. §2119(2), carjacking with resulting serious bodily injury is subject to a maximum penalty of 20 years imprisonment. The indictment returned against petitioner

[3] Reporter's Transcript, Sentencing hearing dated December 13, 1993.

did not allege serious bodily injury, and no evidence of such injury was presented to the grand jury. When petitioner was arraigned on the indictment, he was advised by the magistrate judge that the maximum penalty on the carjacking count was 15 years imprisonment, and both the plea negotiations and the trial proceeded on that basis.

The government's discovery did not disclose, and its trial brief did not mention, any type of serious bodily injury associated with the offense. No evidence of serious bodily injury was presented at trial, and the jury was not instructed on that issue. Petitioner received no notice of a serious bodily injury allegation until the draft presentence report prepared after conviction. Based upon that report, the district court found that a victim had suffered serious bodily injury and, based upon that finding, the court sentenced petitioner to 20 years on the carjacking count, 5 years more than the statutory maximum absent serious bodily injury.[4]

When petitioner protested the lack of notice of the serious bodily injury allegation, its absence from the indictment returned by the grand jury, and the failure of the government to prove the allegation to the jury beyond reasonable doubt, the response of the district court and then the court of appeals was that serious bodily injury was not an element of the offense with the attendant

[4] Thus, this case is unlike *Edwards v. United States*, 118 S.Ct. 1475, 1477-1478 (1998), where the fact to be determined by the sentencer did not increase the statutory range of punishment, but rather related to what sentence would be imposed from within that range.

constitutional protections, but merely a factor to be considered at the post-trial sentencing.

In so construing §2119, the Ninth Circuit relied upon the structure of the statute, its titling, and its legislative history. However, the structure of §2119, especially when viewed in the context of other federal criminal laws incorporating serious bodily injury or related injury concepts, does not support the interpretation advanced by the Ninth Circuit. In addition, the statutory titles are too generalized to provide a reliable indicator as to congressional intent on whether serious bodily injury is an element of the crime or a sentencing factor. Finally, the Ninth Circuit read too much into what little legislative history there is, which is too unfocussed and summary in nature to support the court's opinion. However, there are factors, overlooked by the Ninth Circuit, which point to an interpretation of serious bodily injury as an element of the offense under section 2119(2).

First, serious bodily injury is a fact linked to and intertwined with the facts constituting the criminal offense. Such facts have traditionally been preliminarily found by the grand jury in returning an indictment, and ultimately resolved by the jury beyond a reasonable doubt in returning a verdict, unlike the recidivism facts pertaining to the offender analyzed in *Almendarez-Torres v. United States*, 118 S.Ct. 1219 (1998).

Second, in establishing the particularized robbery offense of carjacking, Congress legislated against the backdrop of existing state robbery statutes and was aware of and guided by state practice in this area. In this regard, the states that have incorporated serious bodily injury

into their robbery statutes have generally done so by making it an element of a separate offense of aggravated robbery.

Third, a 1994 amendment to the carjacking statute established that "if death results" was an element of the offense under §2119(3). There is no reason why serious bodily injury should not be given parallel treatment under §2119(2).

In addition, the rule of lenity requires that ambiguity in a criminal statute should be resolved in the favor of the defendant. *E.g., United States v. Granderson*, 511 U.S. 39 (1994). At the very least, there is a fundamental ambiguity in §2119 as to whether serious bodily injury should be construed as an element of the offense or only a factor for sentencing. Under the rule of lenity, the Court should construe it as an element with the attendant constitutional protections.

On the other hand, if serious bodily injury were construed as a sentencing factor, then it would be invalid under the Fifth Amendment. That amendment, as construed by the Court, prohibits classification of a fact of the criminal offense which exposes the defendant to a significantly greater maximum term of imprisonment as merely a sentencing factor. Unlike recidivism facts regarding the offender, which have been treated as sentencing factors and can be determined by the sentencer under a preponderance of the evidence standard (*Almendarez-Torres*, 118 S.Ct. 1219), facts involving the means of committing the crime which the government seeks to punish with a greater statutory penalty must be alleged

in an indictment and found by a jury beyond a reasonable doubt. *E.g., Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Finally, given the grave doubts regarding the constitutionality of the statute which would otherwise arise, the principle of constitutional doubt requires the Court to construe serious bodily injury as an element of the offense under §2119(2).

ARGUMENT

I.

DETERMINATION OF THE FACT OF THE OFFENSE OF CARJACKING THAT INCREASES THE STATUTORY MAXIMUM BY TEN YEARS – THE INFLICTION OF SERIOUS BODILY INJURY – MUST BE SUBJECT TO THE CONSTITUTIONAL PROTECTIONS OF A GRAND JURY INDICTMENT, JURY TRIAL, AND PROOF BEYOND A REASONABLE DOUBT

The initial inquiry is whether "serious bodily injury" in 18 U.S.C. §2119(2), is an element defining a separate crime of aggravated carjacking or only a factor which a sentencing court may use to increase the punishment for the crime of carjacking. *Almendarez-Torres*, 118 S.Ct. at 1223. If classified merely as a sentencing factor, the fact of serious bodily injury would not have to be stated in the indictment,[5] found by the jury,[6] or proved beyond a reasonable doubt.[7] In addition, the evidence presented to

[5] *Almendarez-Torres*, 118 S.Ct. at 1223.

[6] *Spaziano v. Florida*, 468 U.S. 447, 459 (1984).

[7] *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

establish the fact of serious bodily injury would need not be either subject to cross-examination[8] or admissible under the Federal Rules of Evidence.[9]

In order to interpret section 2119, the Court must review "the statute's language, structure, subject matter, content and history." *Almendarez-Torres*, 118 S.Ct. at 1223. Such a review shows that Congress intended serious bodily injury to be an ingredient of the offense under 18 U.S.C. §2119(2), with the accompanying constitutional protections. The Court should so hold.

A. The Statutory Language and Structure

The statutory language and structure of 18 U.S.C. §2119 provide no reliable indicia as to Congress' intent in classifying serious bodily injury.

First, in enacting section 2119,[10] Congress did not expressly state that serious bodily injury was not an

[8] 18 U.S.C. §3661.

[9] Fed.R.Evid. 1101(d)(3).

[10] The statute, as enacted in 1992, provided:

> Whoever, possessing a firearm as defined in Section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

element of the offense under 18 U.S.C. §2119, or that the defendant was not entitled to notice thereof prior to conviction, or that the fact of the injury was to be determined by the court, by a preponderance of evidence, after conviction and before sentencing. *Compare McMillan v. Pennsylvania*, 477 U.S. 79, 81 n. 1 (1986).

Second, serious bodily injury was included in the statute which first established carjacking as a federal crime. Thus, this is not a case where the elements of the offense at issue were already established and where a factor was added by Congress to enhance an existing crime. *Compare United States v. Jackson*, 824 F.2d 21, 24, 25 (D.C. Cir. 1987).

Third, serious bodily injury was not placed in a statutory subsection with a subject matter title expressly addressed to penalty or sentencing.[11] *Compare* 18 U.S.C. §111(b) (subsection entitled "Enhanced penalty" provides for increased maximum punishment for assault where defendant inflicts bodily injury); 18 U.S.C. §2262(b)(2) and (3) (subsection entitled "Penalties" provides for increased maximum punishment for interstate violation of protective order where serious bodily injury to the victim or life threatening bodily injury to the victim results); 21 U.S.C. §841(b) (subsection entitled "Penalties"

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(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

[11] As the Court has pointed out, "a title that contains the word 'penalties' more often, but certainly not always, signals a provision that deals with penalties for a substantive crime." *Almendarez-Torres*, 118 S.Ct. at 1226 [citation omitted].

provides for increased minimum and/or maximum punishment for drug offenses where serious bodily injury results); 21 U.S.C. §960(b) (same). Nor is the carjacking statute one where the elements of the offense and the punishment are set forth in separate (albeit untitled) subsections. *Compare* 8 U.S.C. §1324(b)(iii) (increased maximum punishment for bringing in or harboring an alien where the defendant causes serious bodily injury); 18 U.S.C. §247(d)(2) and (3) (increased maximum penalty for use of hazardous or injurious devices on federal lands where bodily injury or serious bodily injury to a person results).

Fourth, section 2119's serious bodily injury language lacks "other common indicia of sentence enhancements provisions." *United States v. Davis*, 801 F.2d 754, 756 (5th Cir. 1986). The statute does not a) predicate punishment upon conviction under another statutory section or subsection; b) derive its penalty as a multiplier of a penalty set forth in another section or subsection; c) bear a title as a sentencing provision; or d) provide a procedure for a sentencing hearing on the issue. *Davis*, at 755-756; *see also United States v. Rumney*, 867 F.2d 714, 718 (1st Cir. 1989).

The Ninth Circuit based its finding that Congress intended 18 U.S.C. §2119(1)-(3) to be sentencing factors, rather than elements of the offense, primarily on the argument that subsections (1)-(3) "could not stand alone, independent of the main paragraph." J.A. 30. However, in light of the substantial impact on the defendant's constitutional rights arising from classification as a sentencing factor, this structural feature should not be treated as conclusive on the issue of Congress's intent in classifying serious bodily injury. *Cf. United States v. Resaq*, 134 F.3d

1121, 1137 (D.C. Cir. 1998); *United States v. Michael*, 10 F.3d 838, 840 (D.C. Cir. 1993).

This is particularly true, given the fact that, while Congress has incorporated the concept of bodily injury and degrees thereof into numerous federal criminal statutes, it has not done so in a consistent manner. In reviewing those statutes, certainly no pattern appears that provides a reliable indicator as to Congress's intent regarding whether the injury factor is to be an element of the offense or merely a sentencing factor. In some statutes, serious bodily injury or a similar factor is set forth in the definition of the crime. *E.g.*, 10 U.S.C. §928, 18 U.S.C. §37, 18 U.S.C. §1091, 18 U.S.C. §1153(a), 18 U.S.C. §2332(c). In other statutes, the injury factor is placed in the definition of the crime, and then repeated in the penalty provisions. *E.g.*, 18 U.S.C. §831, 18 U.S.C. §1959, 18 U.S.C. §2261, 18 U.S.C. §2332B. In still other statutes, the injury factor is set forth in a subsection entitled "Penalties." *E.g.*, 18 U.S.C. §2262(b), 21 U.S.C. §841(b), 21 U.S.C. §960(b). In 18 U.S.C. §43, serious bodily injury is placed in subsection (b), entitled "Aggravated Offense," whereas in 18 U.S.C. §111, bodily injury appears in subsection (b), entitled "Enhanced penalty." 18 U.S.C. §113 provides that "Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows," with separate provisions for seven different categories of assault. Thus, the structure of a particular federal statute, in itself, provides little guidance as to whether Congress intended an injury factor to be an element of the offense with the attendant constitutional protections, or merely a sentencing factor.

B. The Statutory Subject Matter

The statutory fact, serious bodily injury, is a fact associated with the commission of the crime, rather than the history of the offender. As such, it is the type of fact that has historically been determined, and is best determined, by a jury beyond a reasonable doubt.

In *Almendarez-Torres*, the Court found that in 8 U.S.C. §1326(b)(2), the fact of the prior conviction was a sentencing factor increasing the maximum prison term for a deported alien returning to the United States without permission, where the reentering alien has a prior aggravated felony conviction. *Almendarez-Torres*, 118 S.Ct. at 1223-1226. In doing so, the Court repeatedly stressed the nature of the statutory factor as one traditionally addressed at sentencing: "the relevant statutory subject matter is recidivism . . . as typical a sentencing factor as one might imagine" (*Id.*, at 1224), "one of the most frequently found factors that affects sentencing" (*Id.* at 1229), "a traditional, if not the most traditional basis for a sentencing Court's increasing an offender's sentence" (*Id.* at 1230). Prior convictions relate to the offender, and not the offense, and facts relating to the offender have traditionally been treated as sentencing factors to be determined by the court. Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S.Cal. L.Rev. 289, 302-303 (1992). In particular, "under traditional sentencing procedures, proof of a defendant's prior felony convictions typically is the type of individual background information considered by the judge, and not the jury." *United States v. Forbes*, 16 F.3d 1294, 1299 (1st Cir. 1994).

Moreover, as the Court pointed out, the existence of a prior conviction is a fact "almost never contested" (*Almendarez-Torres*, 118 S.Ct. at 1226) and, if contested, is usually readily determined by the relevant court documents. Thus, "the primary rationale for requiring sentencing factors to be submitted to a jury – the necessity for accurate factfinding – does not apply in the instant case. Prior convictions are highly verifiable matters of record which need not be subject to jury inquiry." *Rumney*, 867 F.2d at 719 (quoting *United States v. Brewer*, 853 F.2d 1319, 1326 (6th Cir. 1988)).

Furthermore, a fact issue regarding recidivism will presumably have already been determined in a manner, consistent with due process, that ensures that the issue was fairly and accurately determined. Thus, the facts supporting a prior conviction will have been determined following an indictment by grand jury and through proof to a petit jury beyond a reasonable doubt (or by an informed, intelligent waiver thereof). Given the reliability associated with these procedures, there would generally be no need to relitigate the recidivism fact issue. *See Brewer*, 853 F.2d at 1326 ("Because defendants had received the totality of protections due in the prior proceedings, no additional fact finding is necessary").

Finally, as the Court recognized, due to the nature of the evidence involved, classifying a prior conviction as an element of an offense "risks unfairness" to the defendant. *Almendarez-Torres*, 118 S.Ct. at 1226. "[I]f the disputed provision were deemed a separate element, the government would be required to place evidence of the defendant's prior felony convictions before the jury." *Forbes*, 16 F.3d at 1299. "The inherently prejudicial nature of this

kind of evidence is well known." *Jackson*, 824 F.2d at 25. Accordingly, "we do not believe, other things being equal, that Congress would have wanted to create this kind of unfairness in respect to facts that are almost never contested." *Almendarez-Torres*, 118 S.Ct. at 1226.

By contrast, "[h]ere the factor to be classified as an element or a sentence enhancer is radically different. . . ." *Michael*, 10 F.3d at 842. First, the question of serious bodily injury is closely related to and intertwined with the facts of the offense. It thus presents issues that have traditionally been resolved by – and are best resolved by – the jury. *See Michael*, 10 F.3d at 842 ("[h]ere the factor in question is . . . an aspect of the events associated with the crime itself and a fact that juries typically resolve").[12]

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[12] Where the statutory factor is an aspect of the events associated with the crime itself, the Courts of Appeals have often treated it as an element of the offense to be alleged in the indictment and proved to a jury beyond a reasonable doubt. For example, a majority of courts to have addressed the issue have held that the nature and quantity of the drug is an element of the offense under 21 U.S.C. §844(a). *See United States v. Stone*, 139 F.3d 822, 1998 WL 191046 (11th Cir. (Fla.), 1998); *United States v. Wilson*, 284 F.2d 407 (4th Cir. 1960); *United States v. Deisch*, 20 F.3d 139 (5th Cir. 1994); *United States v. Sharp*, 12 F.3d 605 (6th Cir. 1993); *Michael*, 10 F.3d 838; *United States v. Puryear*, 940 F.2d 602 (10th Cir. 1991); *see, contra*, *United States v. Butler*, 74 F.3d 916 (9th Cir. 1996); *United States v. Smith*, 34 F.3d 514 (7th Cir. 1994); *United States v. Monk* 15 F.3d 25 (2d Cir. 1994). In like manner, the drug distributer's status as a minor under former 21 U.S.C. §841(a)(1) has been held to be an element of the offense. *United States v. Moore*, 540 F.2d 1088 (D.C. Cir. 1976).

Similarly, value has been held to be an essential element of several different federal offenses, including theft of government property under 18 U.S.C. §641 (*e.g.*, *United States v. Alberico*, 604

Second, the existence of serious bodily injury as defined by 18 U.S.C. §1365(g)(3)[13] is often likely to be a highly disputed issue, which requires the accurate fact finding associated with jury determination of facts beyond a reasonable doubt. *See Rumney*, 867 F.2d at 719.

Third, unlike a fact issue regarding recidivism, there will have been no prior adjudication of a fact issue associated with the crime. Thus, in order to ensure a fair and accurate determination of this fact, for which the government is seeking to punish the defendant, it should be adjudicated under normal due process standards, including grand jury indictment and proof to a jury beyond a reasonable doubt.

Finally, because of the close connection between the facts of the offense and the question of serious bodily injury, there is little additional prejudice to the defendant in having the government prove the latter to the jury. Indeed, the government will most often seek to introduce

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F.2d 1315, 1321 (10th Cir. 1979); *Theriault v. United States*, 434 F.2d 212, 214 (5th Cir. 1970)); stealing goods from interstate shipment under 18 U.S.C. §659 (*e.g., United States v. Scanzello*, 832 F.2d 18, 22-23 (3d Cir. 1987)); and larceny from a bank under 18 U.S.C. §2113(b) (*e.g., United States v. Luckey*, 655 F.2d 203, 204-205 (9th Cir. 1981)).

[13] The statute provides:

> "the term 'serious bodily injury' means bodily injury which involves –
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> (A) a substantial risk of death;
>
> (B) extreme physical pain;
>
> (C) protracted and obvious disfigurement; or
>
> (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

this evidence to provide the context of the crime to the jury. *See Resaq*, 134 F.2d at 1136 (Under 49 U.S.C. §1472, the air hijacking statute, "[t]he fact that a death resulted from a hijacking is 'closely related' to the circumstance of the hijacking; indeed, this fact will ordinarily be admissible at trial, to prove that the defendant used force or intimidation in committing the crime.") Thus, in contrast to the prior conviction factor in 8 U.S.C. §1326, the nature of the serious bodily injury inquiry indicates that it must be classified as an element of the offense established by 18 U.S.C. §2119, with the attendant constitutional protections.

In short, the *Almendarez-Torres* Court found the prior conviction to be a sentencing factor, largely because recidivism issues such as prior convictions have traditionally been sentencing matters for the court. In contrast, serious bodily injury is the type of factual issue associated with the criminal conduct that has traditionally been relegated to the jury for determination. As the Court of Appeal stated in *Jordan v. U.S. District Court for District of Columbia*, 233 F.2d 362 (D.C. Cir.), *vacated on other grounds sub nom. Jordan v. United States*, 352 U.S. 904 (1956):

> where the aggravation arises from the manner in which the crime was committed, in substance a different aspect of the offense is sought to be punished . . . we think . . . that the facts in aggravation must be charged in the indictment and found to be true by the jury.

Id., at 367.

C. The Legislative History

18 U.S.C. §2119, enacted as part of the Anti Car Theft Act of 1992, Public Law 102-519, 102nd Congress, 106 Stat. 3384, was contained in Title I of the Act entitled "Tougher Law Enforcement Against Auto Theft," under Subtitle A entitled "Enhanced Penalties for Auto Theft." Subtitle A contained five sections:

§101: Federal Penalties for Armed Robberies of Autos, which added 18 U.S.C. §2119;

§102: Importation and Exportation, which *enhanced* the maximum penalty for importation and exportation of stolen motor vehicles under 18 U.S.C. §553 from 5 years to 10 years;

§103: Trafficking in Stolen Vehicles, which *enhanced* the maximum penalty for transportation, sale or receipt of stolen vehicles under 18 U.S.C. §§2312 and 2313(a) from 5 years to 10 years;

§104: Civil and Criminal Forfeiture, which *extended* the civil forfeiture and criminal forfeiture statutes (18 U.S.C. §§981(a)(1) and 982(a)) to provide for forfeiture of property representing the proceeds of auto theft crimes;

§105: Chop Shops, which added 18 U.S.C. §2322, proscribing the owning or operating of a chop shop.

According to its descriptive title, Subtitle A provided "Enhanced Penalties for Auto Theft." It did so by increasing the maximum punishment under three existing statutes (Secs. 102 and 103), providing for additional civil and criminal forfeiture penalties (Sec. 104), and establishing two new offenses (Secs. 101 and 105). Contrary to the

opinion of the Ninth Circuit herein (J.A. 31), the descriptive title and subtitle of the Act do not address, much less resolve, the question of whether Congress intended "serious bodily injury" in 18 U.S.C. §2119 to be a sentencing factor or an element of the offense.[14] *See Forbes*, 16 F.3d at 1298 ("Nor does the title of the statute offer sufficient guidance about whether subsection (b) [of 8 U.S.C. §1326] is a sentence enhancer or a separate element of the crime").

The Ninth Circuit also relied upon the legislative history as suggesting an intent that §2119 set forth enhanced penalties. J.A. 31. To the contrary, the legislative history is too "imprecise" to provide reliable evidence of such congressional intent. *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Colleries*, 512 U.S. 267, 280 (1994).[15]

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[14] The Ninth Circuit stated, "Clearly the title, and undoubtedly the subtitle, suggest an intent that §2119 set forth enhanced penalties." J.A. 31. The court's reliance on titles is misplaced. The title "Tougher Law Enforcement Against Auto Theft," to the degree that it was intended to encompass §2119, merely refers to that section's establishment of the federal crime of carjacking, a new form of auto theft. Similarly, the subtitle "Enhanced Penalties for Auto Theft," to the degree it was intended to refer to §2119, merely refers to the increased punishment set for a particular type of auto theft, *i.e.*, the new crime of carjacking established by that section.

[15] In any event, "it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history." *United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J. concurring in part and concurring in the judgment, joined by Kennedy and Thomas, JJ.). See discussion of rule of lenity at pages 29-30, *infra*.

The legislative history of 18 U.S.C.A. §2119 is comprised of the report of the House Judiciary Committee, No. 102-851(I)[16], the report of the House Energy and Commerce Committee, No. 102-851(II)[17], and the report of the House Ways and Means Committee, No. 102-851(III).[18] No Senate report was submitted with the legislation. The signing statement by the President of the United States, the Honorable George W. Bush, appears in the published legislative history. With attachments, the three committee reports run for seventy-three pages. While there is considerable discussion in these reports regarding other parts of the bill, such as identifying auto parts, there is little regarding the offense of carjacking or the intent of Congress in establishing that crime. There is certainly no evidence that Congress made a considered choice to classify serious bodily injury as a sentencing factor, rather than an element of the offense.

Thus, when the Anti Car Theft Act of 1992 was first approved by the House Committee on the Judiciary, the House Report stated:

> H.R. 4542 contains four titles. Title I increases federal sentences for auto theft, provides new asset forfeiture remedies against auto thieves, provides funding assistance to law enforcement, and creates a new crime for armed carjacking."

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[16] H.R. 102-851(I) 102nd Cong., 2d Sess., U.S. Code Cong. & Admin. News 2829 (1992). The legislative history of 18 U.S.C. §2119 appears at U.S. Code Cong. & Admin. News 2829-903.

[17] H.R. 102-851(II) 102nd Cong., 2d Sess., U.S. Code Cong. & Admin. News 2844 (1992).

[18] H.R. 102-851(III) 102nd Cong., 2d Sess., U.S. Code Cong. & Admin. News 2895 (1992).

H.R. Rep No. 102-851(I), 102nd Cong., p.13, reprinted in 1992 U.S.C.C.A.N. 2830.[19] When the bill was amended and reported out by the House Committee on Energy and Commerce, the report stated:

> Title I of the Committee amendment contains provisions which include a new Federal Crime for armed "carjacking". The Committee adopted an amendment offered by Mr. Bliley to section 101(a) of H.R. 4542 as reported by the Committee on the Judiciary increasing the maximum prison term for carjacking to 25 years, instead of 15 years as in the Judiciary bill, when carjacking results in bodily injury. If death results, the penalty could be life in prison and a fine.

H.R. Rep No. 102-851(II), 102nd Cong., p.14, reported in 1992 U.S.C.C.A.N. 2847. The committee reports generally describe one *effect* of the original version of the bill and of its subsequent amendment. As the D.C. Circuit stated in a similar context, "We note there is some ambiguity in the remarks quoted. Even where a provision adds a new crime accompanied by severe penalties, it would hardly be startling for a member of Congress to characterize it as increasing penalties which would in fact be one of its effects." *Michael*, 10 F.3d at 841. The critical point is that the committee reports do not address the question of classification of serious bodily injury as an element or as

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[19] See also *Id.* at 16, reported in 1992 U.S.C.C.A.N. 2832:

> H.R. 4542 would enable a greater contribution by federal law enforcement agencies by creating a new federal crime for carjacking, by establishing new forfeiture remedies against auto thieves, and by increasing the sentences for existing federal crimes related to auto theft.

a sentencing factor. *Cf. Almendarez-Torres*, 118 S.Ct. at 1242 (Scalia, J., dissenting) (legislative history showing intent to increase penalties does not resolve whether statute does so by adding penalties to an existing offense or by creating an additional, more severely punished offense).

Thus, contrary to the suggestion of the Ninth Circuit, this limited and ambiguous legislative history provides no reasonable basis for concluding that Congress chose to classify serious bodily injury as a sentencing factor and thereby to deny a criminal defendant fundamental constitutional rights as to that issue.

D. Prevailing State Practice

It is reasonable to assume that in establishing the new federal offense of carjacking, Congress was aware of, and guided by, the practices of the various states in codifying similar offenses. *Cf., Morrissette v. United States*, 342 U.S. 246, 263 (1952); *Almendarez-Torres*, 118 S.Ct. at 1242 (Scalia, J., dissenting). Since carjacking is but a particularized form of robbery, Congress presumably looked to state robbery laws to determine how those statutes treated serious bodily injury or comparable factors. A review of state practice in this area would have shown that the states have treated serious bodily injury, a fact relevant to the means of committing the crime, different than a recidivism factor, such as prior convictions. As set forth in tabular form in the Appendix hereto, the states that have incorporated serious bodily injury or a comparable injury factor into their robbery statutes have generally done so by making the factor an element of an

offense of aggravated robbery[20] or of robbery in the first degree.[21] The aggravated offense has generally been set forth in a separate statutory section from the general robbery statute[22] and classified as a different class of felony than robbery.[23]

The practice of the states with regard to their robbery statutes is in accord with the general rule regarding indictments. As Professor Bishop stated in his criminal procedure treatise,

> [E]very wrongful fact, with each particular modification thereof, which, in law, is required to be taken into the account in determining the punishment upon a finding of guilty, must be alleged in the indictment. . . . This doctrine is fundamental. Originating in natural reason and abstract justice, it has been adopted into the

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[20] Arkansas, Colorado, Kansas, Minnesota, Tennessee, Texas, Utah, Wyoming.

[21] Alabama, Alaska, Connecticut, Delaware, Guam, Hawaii, Iowa, Kentucky, Missouri, New York, Oregon, Pennsylvania, Rhode Island, Virgin Islands, Washington.

[22] Alabama, Alaska, Arkansas, Colorado, Connecticut, Guam, Hawaii, Iowa, Kansas, Kentucky, Minnesota, Missouri, New York, Oregon, Tennessee, Texas, Utah, Virgin Islands, Washington.

[23] Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Kentucky, Missouri, New Hampshire, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Washington.

common law and confirmed by our written constitutions.

Joel P. Bishop, *Bishop's Criminal Procedure* §77(1)-(2) at 47 (4th ed. 1895); *see also United States v. Reese*, 92 U.S. 214, 232 (1875) ("every ingredient of the offense must be accurately and clearly expressed; or, in other words, . . . the indictment must contain an allegation of *every fact which is legally essential to the punishment to be inflicted*"; emphasis added).

E. Subsequent Legislative Action

As this Court has noted, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367, 380-81 (1969) (footnote with citations omitted); *see also Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (views of subsequent Congress "entitled to significant weight"). This is "particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding*, 444 U.S. at 596.

In 1994 Congress amended 18 U.S.C. §2119(3) to provide the death penalty as an alternate punishment if death results from a carjacking. Pub.L. No. 103-322, 108 Stat. 1796 (1994). In so doing, Congress established "if death results" as an essential element of the offense under §2119(3). In *Coker v. Georgia*, 433 U.S. 584, 599 (1977), this Court held that a crime "not involving the taking of a life" cannot be a capital crime. Since somebody dying is an irreducible element of a capital offense,

"if death results" is an irreducible element of the offense defined by 18 U.S.C. §2119(3).

In addition, treatment of "if death results" as an element to be alleged in the indictment is necessary to vindicate the grand jury's role in controlling the decision "whether to charge a greater or lesser offense, including the important decision to charge a capital crime." *Campbell v. Louisiana*, 118 S.Ct. 1419, 1423 (1998).

Moreover, at the same time as Congress amended §2119(3) in 1994, it enacted the Federal Death Penalty Statute, 18 U.S.C. §§3591 *et seq.*, including section 3591(a) which provides for a death sentence, after a verdict of death in a hearing under Section 3593, in the case of "(a) defendant *who has been found guilty of* – . . . (2) any other offense for which a sentence of death is provided . . . " (Emphasis added.) By this legislation, Congress confirmed that "if death results" was intended to be an element of the offense of carjacking under §2119(3). A carjacking defendant could not be "found guilty of . . . [an] offense for which a sentence of death is provided," as required by Section 3591, unless the fact of death resulting, the trigger for death penalty eligibility under §2119, was an element of the offense of carjacking to be determined by the jury in returning its finding of guilty.

In *Resaq*, 134 F.3d 1121 (D.C. Cir. 1998), the D.C. Circuit considered whether "if death results" is an element of the offense of air piracy under 49 U.S.C. §1472(n). In doing so, the court analyzed the relationship between §1472 and §1473(c)(2), the air piracy death penalty statute. This relationship directly parallels that between 18

U.S.C. §2119(3) and the general death penalty statute, 18 U.S.C. §3591 *et seq.* The court reasoned that Congress must have intended "if death results" to be an element of air piracy to be tried to the jury because otherwise there would have to be, first, a jury trial as to air piracy, second, a court hearing on death resulting, and finally, a jury trial as to penalty.[24]

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[24] The court's insightful analysis is directly applicable here:

> The United States also points to the structural relationship of section 1472(n) to another statutory provision, section 1473(c)(2). Under that provision, a death-penalty sentencing hearing must be held when a defendant "is found guilty of or pleads guilty to an offense under section 1472(i) or 1472(n) of this title for which one of the sentences provided is death." 49 U.S.C. App. §1473(c)(2). The death-penalty sentencing hearing is to occur "before the jury which determined the defendant's guilt." §1473(c)(2)(A). The hearing may also occur before "a jury impaneled for the purpose of the hearing," but only if the defendant had pleaded guilty, was convicted in a trial without a jury, or if "good cause" existed to discharge the previous jury. §1473(c)(2)(B). Finally, the hearing may be "before the court alone," but only "upon the motion of the defendant and with the approval of the court and Government." §1473(c)(2)(C).
>
> Construing the "death results" provision as a penalty enhancement would be markedly at odds with the structure and purposes of section 1473(c). Section 1473(c) is triggered whenever a defendant "is found guilty of or pleads guilty to an offense under sections 1472(i) or 1472(n) of this title for which one of sentences provided is death"; a defendant can only be found guilty of or plead guilty to a generalized offense under section 1472(n). Before section (1473(c) could apply, there would need to first be a guilty plea or guilty verdict; then an intermediate proceeding, presumably tried to the court (the usual rule at sentencing proceedings) as to whether "death resulted"; and then, if necessary, the death-penalty sentencing hearing provided for in section 1473(c). This structure is inconsistent with the language of section 1473(c), which contemplates a verdict that leads directly into a death-penalty sentencing hearing. It also ignores the strong policy expressed in section 1473(c) of trying all matters related to the imposition of the death sentence to a jury, where possible. If Congress intended to establish an ornate, three-stage procedure for the imposition of the death sentence in air piracy cases – with the middle stage, and only that stage, tried to the court – it would presumably have said so explicitly, either in the statute or in its legislative history. Neither contains any indication that this is what Congress intended.

Id., at 1135-36.

Given that "if death results" is an element under section 2119(3), there is no reason to believe that Congress intended a different outcome for "if serious injury results" under Section 2119(2). *See Almendarez-Torres*, 118 S.Ct. at 1239 n. 3 (Scalia, J, dissenting) ("It would do violence to the text to treat recidivism as a mere enhancement while treating the parallel provisions as aggravated offenses, which they obviously are").[25]

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[25] The Ninth Circuit apparently overlooked the import of the 1994 legislation, because it concluded that nothing "even remotely indicates that Congress intended that serious bodily injury and death be additional carjacking elements which must be proved beyond a reasonable doubt." J.A. 32.

F. Conclusion

Neither the statutory language and structure nor the legislative history of the enactment of 18 U.S.C. §2119 provides reliable evidence that Congress intended substantial bodily injury to be merely a sentencing factor. However, the nature of that factor (which is intertwined with the facts of the offense), the prevailing state practice, and subsequent legislative action show that §2119(2) is most reasonably construed as establishing a separate offense with the infliction of serious bodily injury as an essential ingredient.

II.

UNDER THE RULE OF LENITY, SERIOUS BODILY INJURY SHOULD BE CONSTRUED AS AN ELEMENT OF THE OFFENSE OF CARJACKING UNDER 18 U.S.C. § 2119(2), WITH THE ATTENDANT CONSTITUTIONAL PROTECTIONS

Under the rule of lenity, "[w]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971). "In these circumstances – where text, structure, and history fail to establish that the government's position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see also Ladner v. United States*, 358 U.S. 169, 177-178 (1957) (" 'when Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity' "); *Simpson v. United States*, 435

U.S. 6, 14-15 (1978); *Toussie v. United States*, 397 U.S. 112, 122-123 (1970).

After reviewing the statutory language, structure, subject matter, context, and history of 18 U.S.C. §2119, at the very least there remains an ambiguity as to the Congressional intent in classifying serious bodily injury, *i.e.*, whether serious bodily injury is an element of the offense to be proved to a jury beyond a reasonable doubt, or merely a factor to be considered by the sentencing judge after conviction. Thus, this is a classic case for application of the rule of lenity, "a time honored interpretive guideline when the Congressional purpose is unclear." *Liparota v. United States*, 471 U.S. 419, 427 (1985). Application of the rule is particularly appropriate in this case. "In the absence of a reasonably clear statement from Congress, at least for a fact embedded in the statutory section defining the crime and closely related to the circumstance of a crime," this Court should not classify serious bodily injury as only a sentencing factor. *See Michael*, 10 F.3d at 842. Doubts should be resolved in petitioner's favor and serious bodily injury construed as an element of the offense under §2119(2). Otherwise, petitioner and those in a similar position will have been denied the constitutional protections of indictment by a grand jury, trial by a petit jury, and proof beyond a reasonable doubt without any reliable evidence that Congress chose such a drastic result.

III.

THE CONSTITUTION REQUIRES THAT "SERIOUS BODILY INJURY" BE CHARGED IN AN INDICTMENT AND BE PROVED BEYOND A REASONABLE DOUBT AT A JURY TRIAL IN ORDER FOR A DISTRICT COURT TO SENTENCE A DEFENDANT IN EXCESS OF THE 15-YEAR STATUTORY MAXIMUM SET FORTH IN 18 U.S.C. §2119(1)

Even if Congress did not intend that "serious bodily injury" be an element of an aggravated carjacking offense that carries a maximum 25-year sentence, the Constitution requires that serious bodily injury be deemed an element in order for the defendant to be imprisoned in excess of the 15-year maximum penalty set forth in 18 U.S.C. §2119(1). As an element, the Fifth Amendment requires that the defendant be provided notice of the serious bodily injury allegation in the indictment (*Hamling v. United States*, 418 U.S. 87, 117 (1974); *Smith v. United States*, 360 U.S. 1, 9 (1959)) and that the government prove such element beyond a reasonable doubt to a jury. *United States v. Gaudin*, 515 U.S. 506 (1995); *Duncan v. State of Louisiana*, 391 U.S. 145, 149 (1968) (trial by jury); *In re Winship*, 397 U.S. 358, 364 (1970) (proof beyond a reasonable doubt).

This Court has established that, where a fact of an offense – in contrast to a characteristic of the offender – significantly increases the authorized penalty beyond the statutory maximum, due process requires that the fact be proven beyond a reasonable doubt at a trial by jury. *See, e.g. Mullaney v. Wilbur*, 421 U.S. 684 (1975); *McMillan v. Pennsylvania*, 477 U.S. 79, 84-91 (1986); *Almendarez-Torres v. United States*, 118 S.Ct. 1219 (1998). In *Mullaney*, the

Court addressed a Maine statute defining a single crime of homicide, which was divided into two punishment categories: murder carrying a maximum sentence of life imprisonment and manslaughter punishable by not more than 20 years imprisonment. 421 U.S. at 691-692. Where the prosecution established an intentional and unlawful homicide at trial, Maine law required the jury to conclusively presume the existence of malice aforethought as an element of murder, unless the defendant proved "that he acted in the heat of passion on sudden provocation," which would reduce the crime to manslaughter. *Id.* at 686.

The Court in *Mullaney* held that the Maine homicide scheme violated due process by relieving the prosecution of the burden of proving beyond a reasonable doubt the absence of heat of passion so as to subject the defendant to the greater maximum penalty authorized for murder. In reaching its decision, the Court accepted the interpretation of the Maine Supreme Court that murder and manslaughter are punishment categories of the single crime of homicide, rather than separate offenses. *Id.* at 689-90. Even though the absence of heat of passion was not a " 'fact necessary to constitute the *crime*' of felonious homicide in Maine," *Id.* at 697 (emphasis in original), the Court concluded that due process does not permit a state to relieve the prosecution of proving a fact of the offense beyond a reasonable doubt where doing so would expose the defendant to a significantly greater maximum term of imprisonment:

> . . . the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen

to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less 'blameworth[y], . . . they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*.

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Id. at 698. The Court emphasized that, if *Winship*'s rule that the prosecution must prove beyond a reasonable doubt each element of a crime "were limited to those facts that constitute a crime as defined by state law, a state could undermine many of the interests that decision sought to protect" simply by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney* at 698.

In *Patterson v. New York*, 432 U.S. 197 (1977), the Court distinguished the Maine statute in *Mullaney* in examining a New York statute that placed on the defendant the burden of proving as an *affirmative defense* to second-degree murder that the defendant had "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." *Id.*, at 198 n.2. The Court declined to adopt a constitutional rule "that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused," explaining that "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required." *Id.*, at 210. However, the Court confirmed the import of *Mullaney* that "a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of an offense." *Id.* at 215.

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the petitioners challenged the constitutionality of a Pennsylvania statute under the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's jury trial guarantee. The Pennsylvania statute "provide[d] that anyone convicted of certain enumerated felonies is subject to a mandatory *minimum* sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person 'visibly possessed a firearm' during the commission of the offense." *Id.*, at 81 (emphasis added). The Court reaffirmed that, as *Patterson* recognized, "there are constitutional limits to the State's power" in defining crimes; "in certain limited

circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." *McMillan*, at 86.

In rejecting the argument that the Pennsylvania statute improperly relieved the prosecution of its burden of proving all elements necessary to establish guilt as the Maine statute did in *Mullaney*, the Court in *McMillan* stressed that the statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.*, at 87-88. The Court relied on this same ground in distinguishing *Specht v. Patterson*, 386 U.S. 605 (1967), where the Court had overturned a Colorado law that permitted a sex-offender's sentence of not more than 10 years to be increased upon certain post-sentencing judicial findings to an indefinite term of up to life imprisonment. *McMillan*, 477 U.S. at 88.

Moreover, in subsequent cases, the Court has repeatedly characterized *McMillan*'s holding that the Pennsylvania statute was not unconstitutional as relying on the fact that the Pennsylvania statute did not create a greater *maximum* penalty, but only a mandatory *minimum* penalty, where it was shown at sentencing that the defendant committed the crime while visibly possessing a firearm. *See Schad v. Arizona*, 501 U.S. 624, 644 n.9 (1991) (citing *McMillan* as "relying on the fact that under Pennsylvania law possession of a weapon 'neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty' ") (quoting

McMillan, 477 U.S. at 88); *Witte v. United States*, 515 U.S. 389, 401 (1995) ("Significantly, we emphasized that the statute in issue [in *McMillan*] 'neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty' ") (quoting *McMillan*, 477 U.S. at 88); *see also Almendarez-Torres v. United States*, 118 S.Ct. 1219, 1237 (1998) (Scalia, J., dissenting) ("No one can read *McMillan* without learning that the Court was open to the argument that the Constitution requires a fact which does increase the available sentence to be treated as an element of the crime").

Recently, in *Almendarez-Torres*, the Court considered a challenge to 8 U.S.C. §1326, which makes it illegal for a deported alien to re-enter the United States without the permission of the Attorney General. Section 1326 carries a maximum penalty of 2 years imprisonment, except that the maximum increases to 10 years under subsection (b)(1) if the defendant was convicted of a felony before deportation, and to 20 years under subsection (b)(2) if the conviction was for an "aggravated felony." The defendant argued that the existence of a prior aggravated felony conviction under §1326(b)(2) is an element of an aggravated offense, not simply a sentencing factor. Because his prior conviction was not alleged in the indictment, as is required for all elements of an offense, the defendant contended that he was unlawfully sentenced in excess of the two-year maximum term of imprisonment.

After rejecting the argument that Congress intended that a defendant's prior aggravated felony conviction be included as an element of an aggravated offense under 8 U.S.C. §1326(b)(2), the Court addressed whether the Constitution nonetheless required that a defendant's prior

conviction must be treated as an element in order to subject the defendant to the 20-year statutory maximum set forth in section 1326(b)(2), rather than the two-year maximum set forth in section 1326(a). The Court held that the statute was not unconstitutional for treating recidivism as a sentencing factor, rather than as an element of the offense. *Almendarez* at 1223.

In doing so, the *Almendarez-Torres* decision relied on the nature of the underlying factor at issue – recidivism – as the critical reason why a defendant's prior conviction does not need to be treated as an element of a §1326(b)(2) offense to pass constitutional muster. The majority repeatedly stressed that the Constitution does not require that a defendant's prior conviction be deemed an element of a section 1326(b)(2) offense because recidivism is uniquely a sentencing factor that relates only to punishment, rather than to the circumstances of the offense. *See, e.g.*, 118 S.Ct. at 1230 ("the sentencing factor at issue here – recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence"); *Id.* at 1232 ("we would also find it difficult to reconcile [the rule that any factor that significantly increases the statutory maximum should be deemed an element of the offense] with our precedent holding that the sentencing-related circumstances of recidivism are not part of the definition of the offense for double jeopardy purposes"); *Id.* at 1224 ("prior commission of a serious crime – is as typical a sentencing factor as one might imagine"); *Id.* at 1228 (the constitutional questions raised by the defendant "do not lead us to doubt gravely that Congress may authorize courts to impose longer sentences upon recidivists who commit a particular

crime"). After citing a long line of authority that emphasized that a defendant's "recidivism 'does not relate to the commission of the offense, but goes to the punishment only,' " *Almendarez-Torres* at 1231 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629 (1912)); *see also Parke v. Raley*, 506 U.S. 20, 26 (1992); *Oyler v. Boles*, 368 U.S. 448, 452 (1962), the Court concluded that "to hold that the Constitution requires that recidivism be deemed an 'element' of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as " 'go[ing] to the punishment only.' " *Id.* at 1231 (quoting *Graham*, 224 U.S. at 629).

Recidivism is distinguishable from the facts of an offense because the existence of prior convictions, unlike facts relating to an offense, are easily verifiable matters that do not require additional findings of fact by a jury. [26] Moreover, the Court in *Almendarez-Torres* correctly noted that, due to the nature of recidivism, defendants may be significantly prejudiced if a prior conviction was considered to be an element of an offense so that a jury would learn that the defendant had been convicted of a prior

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[26] *See, e.g., United States v. McGatha*, 891 F.2d 1520, 1524 (11th Cir.) (prior felony convictions "are not submitted for jury consideration since no additional fact finding is necessary. . . . Prior convictions are highly verifiable matters of public record which may subject the defendant to undue prejudice if revealed to the jury at trial"), *cert. denied*, 110 S.Ct. 2199 (1990); *United States v. Brewer*, 853 F.2d 1319, 1326 (6th Cir. 1988) ("Prior convictions are highly verifiable matters which need not be subject to jury inquiry. Because defendants had received the totality of constitutional protections due in the prior proceedings, no additional fact finding is necessary."), *cert. denied*, 488 U.S. 946 (1990).

felony. 118 S.Ct. at 1226. This same risk of prejudice is not present when a jury is presented with evidence of a fact relating to the charged offense.

The majority in *Almendarez-Torres* downplayed the importance that *McMillan* placed on the fact that the Pennsylvania statute did not increase the maximum penalty as the reason why a fact of the offense did not need to be treated as an element for the statute to pass constitutional scrutiny. The Court in *Almendarez-Torres* indicated, however, that *McMillan*'s language was not determinative "in light of the particular sentencing factor at issue in this case – recidivism." 118 S.Ct. at 1231. The Court similarly distinguished *Mullaney* and *Patterson* on the ground that the immigration statute at issue "involves a sentencing factor – the prior commission of an aggravated felony – that is neither 'presumed' to be present, *nor need be 'proved' to be present, in order to prove the commission of the relevant crime.*" *Id.* at 1229 (emphasis added). *Almendarez-Torres* thus made clear that its decision rested on the unique nature of recidivism as a sentencing factor unrelated to the commission of the offense, rather than on cutting back on the principle that a fact of an offense that significantly increased the maximum penalty must be deemed an element of an offense under the Constitution. *See also* Welsh S. White, *Fact-Finding And The Death Penalty: The Scope of A Capital Defendant's Right To Jury Trial*, 65 Notre Dame Law Review 1, 25-27 (1989) (consistent with Supreme Court authority, a fact should be deemed an element of an offense if the fact relates to the circumstance of a crime rather than the character of the offender and the fact leads to a significantly enhanced sentence).

In this case, petitioner was convicted under the federal carjacking statute, 18 U.S.C. §2119. The statutory maximum sentence at the time of the offense was 15 years imprisonment under subsection (1), unless "serious bodily injury" resulted from the offense which raises the maximum penalty to 25 years imprisonment under subsection (2). 18 U.S.C. §2119 (1992). At the time of petitioner's trial, he had no notice at all of the serious bodily injury allegation. The government did not allege serious bodily injury in the indictment. J.A. 4. When petitioner was arraigned on the indictment, he was advised that the maximum possible sentence for the carjacking offense was 15 years imprisonment. J.A. 7. Moreover, no evidence of serious bodily injury was presented at trial, and the jury was not instructed to determine whether serious bodily injury resulted from the offense. J.A. 10. Nonetheless, after the sentencing judge concluded that the offense resulted in "serious bodily injury," petitioner was sentenced to 20 years imprisonment for his carjacking conviction – 5 years more than the maximum possible sentence under section 2119(1). J.A. 12.[27]

Under the instruction of *Specht*, *Mullaney*, and *McMillan*, Jones's 20-year sentence violates the Fifth and Sixth Amendments because he was sentenced above the 15-year statutory maximum set forth in section 2119(1) on the basis of a judicial finding of serious bodily injury that was neither alleged in the indictment, nor proven beyond

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[27] As set forth in the Statement of the Case, petitioner was originally sentenced to 25 years imprisonment on his carjacking conviction. On remand after appeal, the district court sentenced petitioner to 20 years for the carjacking offense.

a reasonable doubt to a jury. Unlike the recidivism factor at issue in *Almendarez-Torres*, serious bodily injury is a fact concerning the commission of the carjacking offense that a jury must find beyond a reasonable doubt after it is alleged in an indictment, in order to satisfy the Fifth and Sixth Amendments.

IV.

UNDER THE PRINCIPLE OF CONSTITUTIONAL DOUBT, SERIOUS BODILY INJURY SHOULD BE CONSTRUED AS AN ELEMENT OF THE OFFENSE OF CARJACKING UNDER 18 U.S.C. §2119

Under the principle of constitutional doubt, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts about it." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware and Hudson Co.*, 213 U.S. 366, 408 (1916); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 465-466 (1989). "This canon is followed out of respect for Congress, which we assume legislates in light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). "The doctrine seeks in part to minimize disagreement between the Branches by preserving congressional enactments that might otherwise founder on constitutional objections." *Almendarez-Torrez*, 118 S.Ct. at 1228.

In the previous section, petitioner has shown that if 18 U.S.C. §2119(1) through (3) are interpreted to be only sentencing factors, then the statute is unconstitutional. At the very least, if so construed, there would be grave constitutional questions as to the statute's validity. In addition, as discussed previously (see pages 10-29, *supra*), given the ambiguity in the statute, it is reasonable to construe serious bodily injury in 18 U.S.C. §2119 as an element of the offense, rather than as a sentencing factor. Under these circumstances, the principle of constitutional doubt requires the Court to construe serious bodily injury as an element of the offense. As the Eleventh Circuit stated in *United States v. Stone*, 1998 WL 191046 (11th Cir. (Fla.)) in holding that quantity and quality of the drug were elements of the offense, "[b]ecause we find that construing the third sentence of §844(a) to create a separate crime from that stated in the first sentence is a reasonable construction of the statute, we must adopt it to avoid the constitutional questions."

CONCLUSION

We respectfully request that the judgment of the Court of Appeals be reversed and that the case be remanded for resentencing, with a maximum punishment of 15 years on the carjacking count.

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APPENDIX

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Alabama *Wilson v. State*, 695 So. 2d 195, 199 (Ala. Crim. App. 1996)	"Causes serious physical injury to another." First Degree. Class A Felony. Ala. Code § 13A-8-41 (1997).	Robbery; second degree. Class B Felony. Ala. Code § 13A-8-42 (1997).
Alaska *Abdulbaqui v. State*, 728 P.2d 1211, 1214-15 (Alaska Ct. App. 1986)	"causes or attempts to cause serious physical injury to any person." First Degree. Class A Felony Alaska Stat. § 11.41.500 (Michie 1997).	Robbery in the second degree. Class B Felony. Alaska Stat. § 11.41.510 (Michie 1997).
Arkansas *Robinson v. Lockhart*, 823 F.2d 210, 212-13 (8th Cir. 1987)	"Inflicts or attempts to inflict death or serious physical injury upon another person." Aggravated Robbery. Class Y Felony. Ark. Code Ann. § 5-12-103 (Michie 1997).	Robbery. Class B Felony. Ark. Code Ann. § 5-12-102 (Michie 1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Colorado *People v. Driggers*, 812 P.2d 702, 704-05 (Colo. Ct. App. 1991)	"knowingly wounds or strikes the person robbed or any other person with a deadly weapon" Aggravated Robbery. Class 3 Felony. Colo. Rev. Stat. Ann. § 18-4-302 (West 1997).	Robbery. Class 4 Felony. Colo. Rev. Stat. Ann § 18-4-301 (West 1997).
Connecticut *State v. Sewell*, 658 A.2d 598, 600 (Conn. Ct. App. 1995)	"Causes serious physical injury to any person who is not a participant in the crime." Robbery in the first degree. Class B Felony. Conn. Gen. Stat. Ann. § 53a-134 (West 1997).	Robbery in the second degree. Class C Felony. Conn. Gen. Stat. Ann. § 53a-135 (West 1997) (presence of accomplice or armed). --- Robbery in the third degree. Class D Felony. Conn. Gen. Stat. Ann. § 53a-136 (West 1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Delaware *Fullman v. State*, 389 A.2d 1292, 1299 (Del. 1978)	"Causes physical injury to any person who is not a participant in the crime." Robbery in the first degree. Class B Felony. Del. Code Ann., tit. 11, § 832 (1997).	Robbery in the second degree. Class E felony. Del. Code Ann., tit. 11, § 832 (1997).
Guam	"Intentionally inflicts or attempts to inflict serious bodily injury upon another." Robbery in the first degree. 9 Guam Code Ann. § 40.10 (1995). --- "Inflicts serious bodily injury upon another." Robbery in the second degree. 9 Guam Code Ann. § 40.20 (1995).	Robbery in the third degree. 9 Guam Code Ann. § 40.30 (1995).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Hawaii *State v. Doi*, 711 P.2d 736, 736-37 (Hawaii Ct. App. 1985)	" . . . intentionally or knowingly inflicts or attempts to inflict serious bodily injury upon another." Robbery in the first degree. Class A felony. Haw. Rev. Stat. Ann. § 708-840 (Michie 1997). --- " . . . recklessly inflicts serious bodily injury upon another." Robbery in the second degree. Class B felony. Haw. Rev. Stat. Ann. § 708-841 (Michie 1997).	

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Indiana *Burch v. State*, 569 N.E.2d 709, 712 (Ind. Ct. App. 1991)	"serious bodily injury to any person other than a defendant." Class A felony. Ind. Code Ann. § 35-42-5-1 (West 1997). --- "results in bodily injury to any person other than a defendant." Class B felony. Ind. Code Ann. § 35-42-5-1 (West 1997).	Robbery. Class C felony. Ind. Code Ann. § 35-42-5-1 (West 1997).
Iowa *State v. Masters*, 196 N.W.2d 548 (Iowa 1972)	"purposely inflicts or attempts to inflict serious injury" Robbery in the first degree. Class B felony. Iowa Code Ann. § 711.2 (West 1997).	Robbery in the second degree. Class C felony. Iowa Code Ann. § 711.3 (West 1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Kansas *State v. Whitaker*, 872 P.2d 278, 286 (Kan. 1994)	"Inflicts bodily harm upon any person in the course of such robbery." Aggravated robbery. Severity level 3, person felony. Kan. Stat. Ann. § 21-3427 (1996).	Robbery. Severity level 5, personal felony. Kan. Stat. Ann. § 21-3426 (1996).
Kentucky *Hubbard v. Commonwealth*, 932 S.W.2d 381, 383-84 (Ky. Ct. App. 1996)	"Causes physical injury to any person who is not a participant in the crime;" Robbery in the First Degree. Class B Felony. Ky. Rev. Stat. Ann. § 515.020 (Banks-Baldwin 1997).	Robbery in the Second Degree. Class C felony. Ky. Rev. Stat. Ann. § 515.030 (Banks-Baldwin 1997)
Minnesota *State v. Burrel*, 506 N.W.2d 34, 37 (Minn. Ct. App. 1993)	"inflicts bodily harm upon another" Aggravated Robbery in the first degree. Minn. Stat. Ann. § 609.245 (West 1997).	Simple Robbery. Minn. Stat. Ann. § 609.24 (West 1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Missouri *State v. Johnson*, 850 S.W.2d 365, 367 (Mo. Ct. App. 1993)	"Causes serious physical injury to any person;" Robbery in the first degree. Class A felony. Mo. Ann. Stat. § 569.020 (West 1997).	Robbery in the second degree. Class B felony. Mo. Ann. Stat. § 569.030 (West 1997).
New Hampshire *State v. Corey*, 497 A.2d 1196 (N.H. 1985)	"Inflicted or attempted to inflict death or serious injury on the person of another" Class A felony. N.H. Rev. Stat. Ann. § 636:1 (1996).	Robbery. Class B felony. N.H. Rev. Stat. Ann. § 636:1 (1996).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
New York *People v. Ruckdeschel*, 380 N.Y.S.2d 163 (N.Y. App. Div. 1976)	"Causes serious physical injury to any person who is not a participant in the crime;" Robbery in the first degree. Class B felony. N.Y. Penal Law § 160.15 (McKinney 1997). --- "Causes physical injury to any person who is not a participant in the crime;" Robbery in the second degree. Class C felony. N.Y. Penal Law § 160.10 (McKinney 1997).	Robbery in the third degree. Class D felony. N.Y. Penal Law § 160.05 (McKinney 1997).
North Dakota *State v. Clinkscales*, 536 N.W.2d 661, 663-64 (N.D. 1995)	"inflicts bodily injury upon another" Class B felony. N.D. Cent. Code § 12.1-22-01 (1998).	Robbery. Class C felony. N.D. Cent. Code § 12.1-22-01 (1998).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Ohio *State v. Fields*, 646 N.E.2d 866, 871 (Ohio Ct. App. 1994)	"Inflict, attempt to inflict, or threaten to inflict physical harm on another;" Felony of the second degree, Ohio Rev. Code Ann. § 2911.02(A)(2) (West 1998).	Robbery. Felony of the third degree. Ohio Rev. Code Ann. § 2911.02(A)(3) (West 1998).
Oregon *State v. Washington*, 531 P.2d 743 (Or. Ct. App.) *aff'd*, 543 P.2d 1058 (1975)	"causes or attempts to cause serious physical injury to any person." Robbery in the first degree. Class A felony. Or. Rev. Stat. § 164.415 (1997).	Robbery in the second degree. Class B felony. Or. Rev. Stat. § 164.405 (1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Pennsylvania *Commonwealth v. Breakiron*, 571 A.2d 1035, 1042 (Pa. 1990)	"inflicts serious bodily injury upon another;" Robbery. Felony of the first degree. 18 Pa. Cons. Stat. Ann. § 3701(a)(1)(l) (West 1997). --- "inflcits bodily injury upon another . . . " Robbery. Felony of the second degree. 18 Pa. Cons. Stat. Ann. § 3701(a)(1)(iv) (West 1997).	Robbery. Felony of the third degree. 18 Pa. Cons. Stat. Ann. § 3701(a)(1)(v) (West 1997).
Rhode Island *State v. Beauchamp*, 671 A.2d 1238, 1241 (R.I. 1996)	"where a victim is injured" First degree robbery. R.I. Gen. Laws § 11-39-1(a) (1997).	Second degree robbery. R.I. Gen. Laws § 11-39-1(b) (1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Tennessee *State v. Claybrooks*, 910 S.W.2d 868, 871 (Tenn. Crim. App. 1994) Sentencing Commission Comments to § 39-13-403	"where the victim suffers serious bodily injury." Especially aggravated robbery. Class A felony. Tenn. Code Ann. § 39-13-403 (1997). --- "where the victim suffers serious bodily injury." Aggravated robbery. Class B felony. Tenn. Code Ann. § 39-13-402 (1997).	Robbery. Class C felony. Tenn. Code Ann. § 39-13-401 (1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Texas *Silva v. State*, 933 S.W.2d 715, 718 (Tex. Ct. App. 1996)	"causes serious bodily injury to another;" Aggravated Robbery. Felony of the first degree. Tex. Penal Code Ann. § 29.03 (West 1997). --- "intentionally, knowingly, or recklessly causes bodily injury to another;" Robbery. Felony of the second degree. Tex. Penal Code Ann. § 29.02 (West 1997).	
Utah *State v. Cantu*, 750 P.2d 591, 593-94 (Utah 1988)	"causes serious bodily injury on another;" Aggravated robbery. First degree felony. Utah Code Ann. § 76-6-302 (1997).	Robbery. Felony of the second degree. Utah Code Ann. § 76-6-301 (1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Virgin Islands *Government of the Virgin Islands v. Soto*, 718 F.2d 72, 74-75 (3d Cir. 1983)	"Causes physical injury which is incapacitating in any way to any person who is not a perpetrator of the crime;" Robbery in the first degree. V.I. Code Ann. tit. 14, § 1862 (1997). --- "Causes physical injury to any person who is not a participant in the crime." Robbery in the second degree. V.I. Code Ann. tit. 14, § 1863 (1997).	Robbery in the third degree. V.I. Code Ann. tit. 14, § 1864 (1997).
Washington *State v. Mahoney*, 699 P.2d 254, 255 (Wash. Ct. App. 1989)	"Inflicts bodily injury." Robbery in the first degree. Class A felony. Wash. Rev. Code Ann. § 9A.56.200 (West 1997).	Robbery in the second degree. Class B felony. Wash. Rev. Code Ann. § 9A.56.210 (West 1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Wyoming *Amin v. State*, 694 P.2d 119, 123 (Wyo. 1985)	"Intentionally inflicts or attempts to inflict serious bodily injury;" Aggravated robbery. Wyo. Stat. Ann. § 6-2-401(c)(l) (Michie 1997). --- "Inflicts bodily injury upon another;" Robbery. Wyo. Stat. Ann. § 6-2-401(a)(l) (Michie 1997)	

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In the Supreme Court of the United States

OCTOBER TERM, 1997

NATHANIEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

This Court has limited its grant of certiorari to the following questions:

1. Does 18 U.S.C. 2119(1)-(3) describe sentencing factors or elements of the offense?

2. If 18 U.S.C. 2119(1)-(3) sets forth sentencing factors, is the statute constitutional?

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In the Supreme Court of the United States

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No. 97-6203

NATHANIEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction but remanding for resentencing (J.A. 19-40) is reported at 60 F.3d 547. The court's opinion affirming the sentence imposed on remand (J.A. 41-43) is unreported, but the decision is noted at 116 F.3d 1487 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1997. The petition for a writ of certiorari was filed on September 25, 1997, and granted on March 30, 1998. The Court amended its order granting cer-

tiorari on April 6, 1998. 118 S. Ct. 1405. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

As in effect at the time of petitioner's offense, 18 U.S.C. 2119 (Supp. IV 1992) provided as follows:

§ 2119. Motor Vehicles

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.[1]

---

[1] In 1994, Congress amended Section 2119 by substituting "with the intent to cause death or serious bodily harm" for "possessing a firearm as defined in section 921 of this title." Federal Death Penalty Act of 1994, Pub. L. No. 103-322, Tit. VI, § 60003(a)(14), 108 Stat. 1970. The question of the proper construction of the new intent requirement is before this Court in *Holloway* v. *United States*, No. 97-7164 (cert. granted, April 27, 1998). The 1994 amendment also authorized imposition of the death penalty in cases in which death results. 108 Stat. 1970. In 1996, Congress again amended Section 2119 to specify that the term "serious bodily injury" in subsection (2) includes certain sexual assaults. Carjacking Correction Act of 1996, Pub. L. No. 104-217, § 2, 110 Stat. 3020.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of carjacking, in violation of 18 U.S.C. 2119 (Supp. IV 1992), and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1988 & Supp. IV 1992). The court of appeals affirmed petitioner's convictions, but it vacated the sentence originally imposed by the district court and remanded for resentencing. J.A. 19-40. On remand, the district court sentenced petitioner to 300 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. J.A. 41-43.

1. On December 7, 1992, petitioner and two co-defendants, Donovan Oliver and Darryl McMillan, drove petitioner's sister's Cadillac to the parking lot of a liquor store in Bakersfield, California. J.A. 19-20; Trial Tr. 159, 217-219, 453. The men approached a parked Honda Accord and ordered its occupants, Ali Nassar Mutanna and Abdullah Mardaie, to get out. J.A. 20; Trial Tr. 158-159, 387-388. Oliver stuck the barrel of a .45 caliber semi-automatic rifle into Mutanna's left ear, causing it to bleed profusely. J.A. 11, 20; Trial Tr. 159, 199, 223. Petitioner and McMillan then robbed the victims while Oliver held them at gunpoint. J.A. 20; Trial Tr. 160. Oliver took Mutanna behind the liquor store, ordered him to lie on the ground, and struck him on the head. Trial Tr. 165-166, 233-234. Oliver told Mutanna that he would kill him if he moved. *Id.* at 167; see J.A. 11, 20.

Oliver and McMillan drove away in the Cadillac. Trial Tr. 167-168. As they did so, Mutanna began to get up off the ground, and Oliver fired a shot in his direction from the departing Cadillac. *Id.* at 168, 225; Presentence Rep. (PSR) 4; see J.A. 11. Petitioner forced Mardaie into the Honda and drove after the Cadillac. Trial Tr. 167-169, 231-232, 390. After driving a short distance, petitioner ordered Mardaie out of the car. *Id.* at 391; J.A. 11, 20.

After petitioner and his co-defendants left, Mutanna flagged down a police car and showed the police officers the direction in which the carjackers had gone. Trial Tr. 168-169, 306. The police found petitioner sitting in the Honda, which he had parked a few blocks away. J.A. 20; Trial Tr. 308-309. Petitioner drove off as officers approached the Honda, but he was apprehended after a short chase when he crashed the Honda into a telephone pole. Trial Tr. 309-311. The officers later arrested Oliver and McMillan and seized the rifle used in the carjacking from the back seat of the Cadillac. *Id.* at 314-315, 356; J.A. 20-21.

2. A federal grand jury indicted petitioner, Oliver, and McMillan on charges of carjacking, in violation of 18 U.S.C. 2119 (Supp. IV 1992),[2] and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1988 & Supp. IV 1992). J.A. 4-5. At petitioner's arraignment, the magistrate advised him that the maximum penalty for carjacking was 15 years' imprisonment. J.A. 7. At trial, Mutanna testified, among other things, that during the course of the carjacking Oliver had pushed the gun into Mutanna's ear until it started bleeding,

[2] Unless otherwise indicated, all references to Section 2119 in this brief are to the version in effect at the time of petitioner's offense.

that he (Mutanna) had "blood all over" him, and that Oliver repeatedly kicked him in the head as he lay on the ground. Trial Tr. 199, 223, 233-234. At the conclusion of the evidence, the jury was instructed that, in order to find the defendants guilty of carjacking, it must find that the defendants took a motor vehicle while possessing a firearm; that the vehicle had been transported, shipped, or received in interstate or foreign commerce; and that the defendants took the vehicle by force and violence or by intimidation. J.A. 10. The jury found each defendant guilty of both charges.[3] J.A. 21.

3. The presentence report prepared for petitioner's sentencing determined that the maximum term of imprisonment authorized for his carjacking offense was 25 years, because the offense resulted in "serious bodily injury" to a victim (Mutanna). PSR 22. The report explained that "[d]uring the carjacking, one of the victims * * * was struck in the left ear and was then forced to the ground at gunpoint," and that as a result, "the victim's ear swelled and was painful for several days." PSR 6. The report stated further that a medical examination of the victim some time after the carjacking revealed that he had suffered a perforated eardrum, causing permanent hearing loss. *Ibid.*; see also J.A. 11, 15-16, 33-34.[4]

At sentencing, petitioner argued that he could not be sentenced to more than the 15 years' imprisonment authorized by Section 2119(1) because the indictment

[3] Petitioner and his co-defendants were convicted in part on the theory that they aided and abetted each other in committing the charged offenses. J.A. 4-5, 19-20, 25-26; 18 U.S.C. 2.

[4] Copies of medical reports on Mutanna's condition were provided to petitioner's counsel before the sentencing hearing. J.A. 33-34; see 93-10779 C.A. App. 34-41.

had not charged, and the jury was not instructed that it must find, that the carjacking resulted in "serious bodily injury." See J.A. 12-13. The district court rejected that argument, holding that Section 2119(2) did not define a substantive offense separate from the offense defined by the initial paragraph of that Section. The court concluded, instead, that "carjacking is a single offense defined in Section 2119," and that "[sub]sections (1) through (3) are merely sentencing provisions to be applied by the district court at sentencing." J.A. 13; see 12/13/93 Tr. 32, 39. The court found that Mutanna had suffered serious bodily injury as the result of the carjacking, and that the 25-year maximum term of imprisonment authorized under Section 2119(2) therefore applied to petitioner's offense. J.A. 15-16. Based on its reading of the applicable provisions of the Sentencing Guidelines, the district court imposed the statutory maximum sentence for the carjacking offense. It then added a five-year consecutive sentence for the violation of Section 924(c), for a total sentence of 30 years' imprisonment. J.A. 21, 37-40; see 12/13/93 Tr. 41.

4. The court of appeals affirmed petitioner's convictions. J.A. 19-40. As relevant here, the court rejected petitioner's claim that the reference to "serious bodily injury" in 18 U.S.C. 2119(2) defined an element of a separate offense, which the government was required to charge in the indictment and prove at trial. J.A. 27-34. The court concluded, instead, that Section 2119 defines the crime of carjacking in its first paragraph and then sets out, in three subparagraphs, different maximum sentences based on the harm that results, in a particular case, from the commission of the offense. J.A. 28 30.

The court explained that "[t]he plain text of the statute establishes one offense, as defined in the first main paragraph[,] * * * followed by the word 'shall' and then three sentencing possibilities." J.A. 29. Because Congress "did not redefine the essential elements of carjacking in subparagraphs (1), (2) or (3), and those provisions could not stand alone, independent of the main paragraph," the court agreed with the Eleventh Circuit that "the natural reading of the text" was that "§ 2119 sets forth one offense, with several possible penalties." J.A. 28, 30. In addition, the court concluded that the legislative history of Section 2119 provided "persuasive evidence" that Congress intended clauses (1)-(3) of Section 2119 to "set forth enhanced penalties," not additional elements of separate aggravated offenses. J.A. 31-32.

The court rejected petitioner's claim that he had been denied due process because he was not informed through the indictment or at arraignment that he might face the maximum 25-year sentence. J.A. 33-34. The court noted that an indictment need not allege the existence of a sentencing factor, and that petitioner and his co-defendants were given a fair opportunity to contest the existence and relevance of "serious bodily injury" at sentencing. *Ibid.*

Although it affirmed petitioner's convictions, the court of appeals vacated his sentence, holding that the district court had erred in computing the maximum permissible combined penalty, under the Sentencing Guidelines, for petitioner's two offenses. J.A. 37-40.[5]

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[5] The court concluded that under Guidelines § 2K2.4, application note 2, petitioner's total sentence for both offenses should have been limited, in the circumstances of this case, to the 25-year (300-month) maximum specified in 18 U.S.C. 2119(2). J.A. 38-40.

On remand, the district court sentenced petitioner to 240 months' imprisonment on the carjacking count, and to a consecutive term of 60 months' imprisonment on the firearms count, for a total sentence of 300 months' imprisonment. 3/25/96 Tr. 5. The court of appeals affirmed. J.A. 41-43.

SUMMARY OF ARGUMENT

The carjacking statute, 18 U.S.C. 2119, sets forth one offense consisting of armed robbery of a motor vehicle, with three different maximum penalties depending on whether (1) no injury or no serious injury resulted from the crime, (2) serious bodily injury resulted from the crime, or (3) death resulted from the crime. 18 U.S.C. 2119(1)-(3). A finding of serious bodily injury resulting from the crime is a sentencing factor, not an element of a separate criminal offense. The contrary interpretation—that the injury finding is an offense element—is an unnatural textual reading of Section 2119's penalty provisions, and nothing in the Constitution requires that this Court adopt it.

I. This Court has repeatedly made clear that, within broad constitutional limits, the definition of the elements of federal crimes is a matter for Congress, not the courts. The initial question in this case is therefore one of legislative intent. The first paragraph of Section 2119 defines a single carjacking offense, while the succeeding three dependent clauses provide statutory authority to sentencing courts to impose higher sentences when particular harms to victims result from the offense. Comparison with other statutes confirms that Section 2119 differs from those in which Congress may have intended to create both a basic offense and separate aggravated crimes. Instead, Section 2119 resembles in its character and

structure provisions that are clearly intended to define one offense with various ranges of punishments depending on factors found at sentencing. The text and structure of the statute therefore strongly support the interpretation, confirmed by the legislative history and adopted by all the courts of appeals that have considered the question, that resulting "serious bodily injury" (or "death") is a sentencing determination, not an element of a separate offense.

The nature of the factors in question further supports that conclusion. Bodily harm to victims of a crime is, like recidivism, "as typical a sentencing factor as one might imagine." *Almendarez-Torres* v. *United States*, 118 S. Ct. 1219, 1224 (1998). The degree of physical harm caused by a crime is precisely the sort of factual circumstance that courts necessarily consider in imposing sentence. There is no reason to conclude that a statutory reference to resulting bodily harm was intended to define a new offense element, simply because any such harm will generally be closely related to the conduct that constitutes the offense.

Congress's 1994 amendment of Section 2119 to add the possibility of capital punishment in cases in which death results is not relevant to this case, which involves an earlier version of Section 2119, with no capital sentencing provision, and an enhancement based on serious bodily injury, not death. Even if the 1994 amendment were relevant, however, it would not require that the resulting injury factor set out in clause (2) be treated as an offense element. There is nothing to suggest, as a matter of statutory interpretation, that Congress intended the finding of resulting injury to be made by anyone other than the sentencing judge. Although petitioner argues that the

Constitution would require that result in capital cases after 1994, that is far from clear, and there is no reason for the Court to reach or resolve the question in this case.

If any subsequent history of Section 2119 is relevant here, it is Congress's 1996 amendment of the statute, which was a direct response to a judicial decision interpreting the term "serious bodily injury" not to include rape of the carjacking victim. In reacting to that interpretation, Congress focused specifically on the statutory provision at issue in this case, and the relevant materials make clear it understood and agreed that "serious bodily injury" is a factor relevant to the severity of sentencing, not an element of the carjacking offense.

Finally, because use of the standard tools of statutory interpretation leads to the conclusion that bodily injury and death are sentencing factors, not offense elements, the rule of lenity has no application in this case.

II. Nothing in the Constitution requires the Court to adopt any different construction of Section 2119, or to invalidate the statute if it is construed to create sentence-enhancement factors. In *Almendarez-Torres*, this Court upheld the constitutionality of a recidivist sentence enhancement provision that increased applicable maximum penalties. The Court's analysis of the constitutional question there applies equally in this case.

The overall sentencing range established by Section 2119, while somewhat broader than that at issue in *Almendarez-Torres*, fairly reflects the inherent seriousness of the carjacking crime and the risk of harm to persons inherent in it. The increases in the maximum prison sentences authorized by clauses (2)

and (3), while significant, are proportionally smaller than the enhancement upheld in *Almendarez-Torres*. And *Almendarez-Torres* cannot be validly distinguished on the ground that victim injury is constitutionally different from recidivism for these purposes. Both recidivism and harm are conventional sentencing factors.

Finally, there is no sound basis in the Constitution for concluding that, if facts related to the commission of the crime may increase the maximum sentence authorized by law, they must be established as "elements." At its broadest, such a proposed rule could be said to further the principle that any fact significantly affecting a defendant's sentence must be proved at trial in order to protect the defendant's right to trial by jury and to proof beyond a reasonable doubt. But that principle has been repeatedly rejected by this Court's cases, which recognize that many sentencing determinations that have a significant impact on the defendant's sentence may constitutionally be made by the sentencing judge under a preponderance-of-the-evidence standard. Petitioner's narrower argument that clause (1) sets a "statutory maximum" that clauses (2) and (3) may not increase fares no better, because it accords undue constitutional significance to the particular manner in which Congress elects to provide for graduated punishment based on the circumstances of the crime. Under this Court's decisions, Congress could authorize a maximum sentence of life imprisonment for carjacking, but direct that sentencing take place in accordance with mandatory guidelines promulgated by the Sentencing Commission, using the same criteria of serious injury or death to limit sentences to intermediate maximum terms of 15 and 25 years. There can

be no constitutional impediment to accomplishing the same result through the direct statutory guidance set out in Section 2119.

This is not to say that the Constitution places no limit on Congress's ability to define criminal offenses. Aside from explicit textual limitations, such as the Ex Post Facto Clause, the Court has noted that legislatures cannot seek to alter the definitions of traditional common-law offenses in ways that transgress "fundamental fairness." *Monge* v. *California*, No. 97-6146 (June 26, 1998), slip op. 6. Other constitutional principles, such as proportionality and the need for fair notice of criminal prohibitions, also constrain a legislature's power. Such principles must be applied with restraint in order to avoid trenching on legitimate legislative prerogatives. There is no need for the Court to address those issues in this case, however, because the offense-definition and sentencing structure that Congress adopted in Section 2119 for armed carjacking fairly defines a serious violent crime and provides a reasonable structure for punishing those who commit it. The Constitution requires nothing more.

ARGUMENT

I. SECTION 2119 DEFINES A SINGLE FEDERAL CRIME WITH THREE SENTENCING PROVISIONS

Congress creates federal crimes by specifying that certain acts, generally accompanied by a particular mental state, will constitute a criminal offense. The specified acts and mental state become, by definition, the "elements" of the offense. In order for a defendant to be convicted of that offense, a grand jury must allege in an indictment, and the government must

prove beyond a reasonable doubt at trial, facts sufficient to establish the existence of each such element. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 117 (1974); *In re Winship*, 397 U.S. 358, 364 (1970).

Congress must also specify, in one way or another, what punishment may be imposed on an individual who has been found guilty of a given crime. Historically, Congress often simply set out a range of possible penalties for a defined offense, leaving the selection of specific punishments within that range to the broad discretion of the trial judge. See, *e.g.*, 18 U.S.C. 408a (1940) (kidnapping punishable by death or "imprisonment in the penitentiary for such term of years as the court in its discretion shall determine"); see generally *Mistretta* v. *United States*, 488 U.S. 361, 363-366 (1989) (describing historical practice). More recently, Congress has required the use of detailed Sentencing Guidelines, which are set out separately from the provisions that define offenses and are "designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional." *Witte* v. *United States*, 515 U.S. 389, 402 (1995); see generally 18 U.S.C. 3553(b); 28 U.S.C. 994; *Mistretta*, 488 U.S. at 367-370. In addition, Congress has, with respect to some crimes, provided specific statutory guidance for the selection of appropriate sentences within a broad overall range of possible penalties—typically, by specifying minimum or maximum sentences that the court must or may impose, depending on the presence or absence of specified aggravating or mitigating factors. *E.g.*, 8 U.S.C. 1326(b) (Supp. II 1996); 18 U.S.C. 831(b), 2261(b) (1994 & Supp. II 1996); 21 U.S.C. 841(b) (1994 & Supp. II 1996); see *Almendarez-Torres* v. *United States*, 118 S. Ct. 1219 (1998).

Thus, Congress typically defines the elements of a crime, specifies a range of permissible penalties, and then permits or requires the sentencing court to consider a wide variety of potentially relevant facts or circumstances, apart from the elements of the offense itself, in determining what sentence to impose in a given case. See also 18 U.S.C. 3553(a) (setting out general factors to be considered at sentencing). A court may consider such "sentencing factors" in the exercise of its traditional discretion, in accordance with the Sentencing Guidelines, or by direction of the very provision that defines the offense of conviction. However the court comes to consider them, sentencing factors need not be charged in the indictment or proved at trial, and the requirements of due process are generally satisfied so long as the defendant is given a fair opportunity to be heard at sentencing and the court resolves any contested factual issues according to the preponderance of the evidence before it. See, *e.g.*, *United States* v. *Watts*, 117 S. Ct. 633, 635-638 (1997) (per curiam); 18 U.S.C. 3661; Sentencing Guidelines § 6A1.3, commentary.

This Court has repeatedly made clear that, within broad constitutional limits (see generally pages 36-50, *infra*), the definition of the elements of federal crimes is a matter for Congress, not the courts. *Almendarez-Torres*, 118 S. Ct. at 1223; *Staples* v. *United States*, 511 U.S. 600, 604 (1994); *Liparota* v. *United States*, 471 U.S. 419, 424 (1985); *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812) (there is no federal common law of crimes). For that reason, the question whether a particular act, status, or result mentioned in a federal criminal statute—in this case, the result of "serious bodily injury"—is an element of the defined offense or a statutory sentencing factor is

preeminently a question of congressional intent. Like other matters of statutory interpretation, it may be resolved by considering the "language, structure, subject matter, context, and history" of the provision in question. *Almendarez-Torres*, 118 S. Ct. at 1223.

A. The Language And Structure Of Section 2119 Create A Single Carjacking Offense With Graduated Punishments

The language and structure of Section 2119 indicate that Congress intended to define a single crime of carjacking—*i.e.*, armed robbery of a motor vehicle—while providing discretion to sentencing courts to impose greater punishment where the crime produces greater harms. The opening paragraph of the text defines the elements of the offense: possession of a firearm, taking a motor vehicle that has a nexus to interstate commerce, "from the person or presence of another," "by force and violence or by intimidation." That paragraph ends with the word "shall," followed by a dash. The remaining three dependent clauses, separated by commas and joined by the word "and," have to do only with sentencing: each provides for a different maximum term of imprisonment, from 15 years to life, depending on the degree of bodily harm that "results" from commission of the offense just defined. In other words, the sentencing clauses divide the overall range of authorized penalties into statutory sub-ranges, varying the severity of permissible punishment according to the bodily harm suffered by victims of the offense.

None of Section 2119's subsidiary clauses stands on its own as a defined offense; each depends entirely on the initial paragraph to identify the criminal conduct that gives rise to punishment. Conversely, the initial paragraph does stand on its own as a definition of pro-

hibited conduct; the three dependent clauses are relevant only to sentencing, at which stage they define what penalties Congress has authorized for the defined offense, and how their severity varies depending on the particular consequences of the crime. As every court of appeals that has considered the matter has concluded, Section 2119 does not create three substantive offenses, each with separate elements and penalties. Rather, the statute's "structure is integrated, and [its] provisions form a seamless whole," defining one offense with three possible authorized sentencing ranges. *United States* v. *Rivera-Gomez*, 67 F.3d 993, 1000 (1st Cir. 1995); see also *ibid.* ("most natural and sensible" to read Section 2119 as creating only one offense); J.A. 28-29 ("The plain text of the statute establishes one offense."); *United States* v. *Williams*, 51 F.3d 1004, 1009-1010 (11th Cir.) (statute's "plain language and structure clearly indicate" that it defines only one offense with associated sentencing factors), cert. denied, 516 U.S. 900 (1995).

To identify three offenses in the text of Section 2119, the statute's three penalty clauses would have to be read as alternative completions for the offense definition begun in the initial paragraph; each completed alternative, taken as a whole, would then be read to define a separate criminal offense. That construction of the text, however, departs from the general approach employed by Congress in defining separate offenses. Congress does not typically define an offense by listing a number of its elements, adding the verb "shall," and then interposing a final offense element before specifying the range of authorized punishments. Moreover, if the penalty clauses were meant to be alternative completions for the first paragraph, rather than complementary subdivisions of an

overall sentencing range, then they would more naturally be joined by the disjunctive "or" than by the conjunctive "and" that Congress actually used in drafting Section 2119.

If Congress had intended the bodily injury and death factors in clauses (2) and (3) to be elements of separate substantive offenses, it would likely have set them out in more conventional offense-defining language. In 18 U.S.C. 2113 (1994 & Supp. II 1996), for example, subsections (a)-(c) define bank robbery and related offenses, each with its own penalty provisions. Subsections (d) and (e) then create separate aggravated forms of these offenses, by providing that "Whoever, in committing" one of the previously defined offenses, also commits assault, or jeopardizes a life, or kidnaps or kills another, "shall" be subject to specified punishments. Moreover, in setting out additional offense elements, subsections (d) and (e) use the active language of commission that is most often associated with the definition of prohibited conduct: "assaults any person," "puts in jeopardy the life of any person," "kills any person," "forces any person to accompany him." See also 18 U.S.C. 2114(a) ("and if in effecting * * * such robbery he wounds the person[,] * * * or for a subsequent offense, shall be imprisoned" etc.); 18 U.S.C. 2118(c)(1) ("Whoever in committing any offense [previously defined] assaults any person, or puts in jeopardy the life of any person, by the use of a dangerous weapon * * * shall be fined" etc.). By contrast, the passive language of "result[]" found in Section 2119's sentencing clauses suggests that in drafting those clauses Congress was focusing, not on additional conduct that would be the subject of a supplementary prohibition, but on graduating the punishment for carjacking by reference to

the degree of harm caused by a particular defendant's conduct.

These comparisons show that Section 2119 is not written like other statutes in which Congress may have intended to create separate aggravated forms of a basic offense. Furthermore, comparison with two other statutes cited by petitioner (see Br. 13), 8 U.S.C. 1324(a) (1994 & Supp. II 1996) and 18 U.S.C. 247 (1994 & Supp. II 1996), shows that Section 2119 *is* structured very much like statutes that all would agree set out only sentencing factors. In both Section 247 and Section 1324(a), an initial paragraph defining the elements of an offense concludes with the phrase "shall be punished as provided in" and the specification of a different subsection. That subsection, in turn, provides sub-ranges that are graduated according to, among other things, whether bodily injury or death results from the commission of the previously defined offense. See 8 U.S.C. 1324(a)(1)(A) and (B) (Supp II 1996); 18 U.S.C. 247(a) and (d). Petitioner relies (Br. 13) on the fact that in drafting these two statutes Congress formally separated the subdivision dealing with sentencing factors from the subdivision that defines the elements of the offense, whereas in drafting Section 2119 it set one directly after the other, omitting transitional phrases and failing to designate the initial paragraph as subsection (a) and the sentencing clauses as subsection (b). That circumstance, however, does not outweigh the fundamental structural similarity that all of these statutes share: each sets forth offense conduct in one paragraph, followed by separate sections with penalty-enhancing harms graduated by severity.[6]

[6] Congress may express an intention to create sentencing factors even without dividing a provision into separate sections, as it did in Section 2119(1)-(3). For example, 18 U.S.C. 1347 defines health care fraud in its first sentence, and in a second sentence provides escalating maximum sentences "[i]f the violation results in serious bodily injury" or "death." It would be unduly formalistic to suppose that the failure to divide Section 1347 into "(a)" and "(b)," labeled "offense" and "penalties," demands that courts must overlook the clear intention to create one offense with increasing maximum punishment based on sentencing factors.

For all these reasons, petitioner is mistaken when he contends (Br. 11) that Section 2119's language and structure provide "no reliable indicia" of Congress's intent. To the contrary, considered both in isolation and in comparison to other criminal statutes, the statute's language and structure strongly support the conclusion reached by the court below (and other courts of appeals) that resulting injury or death is a matter for determination at sentencing. It is true, of course, that Section 2119 does not "expressly state" that injury is "not an element" (Pet. Br. 11-12), and that the injury factor does not, for example, appear in a separate subsection entitled "penalties" (Pet. Br. 12-13). Every statute must be examined on its own terms, however, and the presence or absence of any one feature will seldom be dispositive.[7] Similarly, petitioner's observation that different statutes take

[7] See, *e.g.*, 18 U.S.C. 2332 (1994 & Supp. II 1996) (titled "Criminal penalties," but clearly defining a number of substantive offenses); *United States* v. *Ryan*, 9 F.3d 660, 668 (1993) ("death results" is a sentencing factor under the federal arson statute, 18 U.S.C. 844(i), although statute "lacks some of the common indicia" of a sentencing provision), modified on other grounds, 41 F.3d 361 (8th Cir. 1994) (en banc), cert. denied, 514 U.S. 1082 (1995); *United States* v. *Rumney*, 867 F.2d 714, 717-718 (1st Cir.) (former 18 U.S.C. App. 1202(a)(1) (1982) was a sentencing provision, despite absence of "indicia of a traditional sentence enhancer"), cert. denied, 491 U.S. 908 (1989).

account of bodily injury in different ways (Br. 14) simply underscores that determining the proper construction of any given provision will often require "a close reading of the text, as well as consideration of other interpretive circumstances." *Almendarez-Torres*, 118 S. Ct. at 1224. In this case, that inquiry leads to the conclusion that clauses (2) and (3) of Section 2119 set out factors to be taken into account at sentencing.

B. The Legislative History Of Section 2119 Supports The One-Offense Construction

The history of Section 2119's drafting and enactment is consistent with the conclusion that it defines one offense with different possible sentencing ranges. The Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384, was first introduced as H.R. 4542. That bill would have enacted a new Section 2119 providing, in its entirety:

> Whoever, by force and violence, or by intimidation, takes a motor vehicle from the person or presence of another, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

H.R. 4542, 102d Cong., 2d Sess. § 101(a) (1992) (as introduced). The House Judiciary Committee amended the bill to require that the offender possess a firearm and that the vehicle taken have previously moved in interstate commerce, and to reduce the maximum authorized term of imprisonment to 15 years. H.R. Rep. No. 851, 102d Cong., 2d Sess. Pt. 1, at 1-2, 17 (1992) (House Rep.). The Committee observed that, as so amended, "[t]he definition of the offense track[ed] the language used in other federal

robbery statutes (18 U.S.C. §§ 2111, 2113 and 2118)." *Id.* at 17.[8]

The House Committee on Energy and Commerce, to which H.R. 4542 was sequentially referred, amended the Judiciary Committee's version of the bill to create the present three-tiered penalty structure. See House Rep., Pt. 2, at 2, 14. The Committee explained that its amendment "increas[ed] the maximum prison term for carjacking to 25 years, instead of 15 years as in the Judiciary bill, when carjacking results in bodily injury. If death results, the penalty could be life in prison and a fine." *Id.* at 14; see also *id.* at 32 (evidently describing a somewhat different version of the Committee's amendment). The final bill that became the Anti Car Theft Act contained this amended version of the provision creating Section 2119. See 106 Stat. 3384; see also 138 Cong. Rec. H11820 (daily ed. Oct. 5, 1992) (final bill was a "compromise" be-

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[8] Given the Judiciary Committee's statement that it used other federal robbery statutes as its model for the portion of Section 2119 that defines the elements of carjacking, petitioner's reliance on supposed state-law precedents (Pet. Br. 24-26, A1-A14) is largely misplaced. Although, as described in the text, the statute's references to bodily injury and death were added by a different Committee, nothing in the language, structure, or history suggests that in adding them Congress might have abandoned ready federal models, such as those discussed in the previous section, in favor of generalized reliance on the state law of assault. In any event, had Congress looked to the state laws petitioner cites, and intended to emulate them, it would presumably have made injury or death "an element of an offense of aggravated robbery or of robbery in the first degree," probably "set forth in a separate statutory section * * * and classified as a different class of felony." Pet. Br. 24-25. That is not, of course, what Congress did in Section 2119. Cf. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 90 (1986).

tween versions reported by Judiciary and Commerce committees).

The Energy and Commerce Committee did not describe its enhanced penalty provisions as "sentencing factors," or discuss whether the relevant "results" of the crime would be determined by the jury or by the sentencing judge. The brief comments in its report, and elsewhere in the legislative history, nonetheless uniformly suggest that the amendment was intended to create and grade a scheme of enhanced penalties, not to alter or supplement the elements of the underlying carjacking offense as it had been defined by the Committee on the Judiciary. See House Rep., Pt. 2, at 14 (bill as reported "contains provisions which include *a* new Federal crime for armed 'carjacking'") (emphasis added); see also, in addition to comments cited *supra*, House Rep., Pt. 3, at 2 (Ways and Means Committee) ("With respect to the theft of automobiles, *a* new Federal crime is defined for armed carjacking") (emphasis added); 138 Cong. Rec. H11820 (daily ed. Oct. 5, 1992) (statement of Rep. Dingell, Chair of the Energy and Commerce Comm.) ("I am pleased that we have agreed to toughen the penalties against carjacking as contained in the Commerce Committee version."); *ibid.* (statement of Rep. Collins) ("This bill would make carjacking a Federal crime with tough penalties, including a sentence of up to life in prison if carjacking results in death"). Thus, to the extent it speaks to the issue at hand, the history of Section 2119 supports the natural reading of the statutory text: Congress intended to establish a single crime of carjacking, defined in the initial paragraph of the provision, and to provide a graduated set of penalties, with significantly greater punishment authorized in those cases in which

commission of the crime results in serious bodily injury or death. Compare *Almendarez-Torres*, 118 S. Ct. at 1226.

C. The Bodily Harm That Results To Victims Is A Traditional Factor In Determining The Severity Of Criminal Sentences

As petitioner observes (Br. 15), this Court made clear in *Almendarez-Torres*, 118 S. Ct. at 1224, that the nature or subject matter of a particular statutory factor may be important in assessing whether Congress intended that factor to help define a separate, aggravated form of an offense, or simply to be taken into account in determining the sentence to be imposed for the basic crime. Like the recidivism factor at issue in *Almendarez-Torres*, the question of victim harm—whether a given robbery, for instance, not only involved the intimidation and loss of property that the law directly prohibits, but also led to the serious injury or death of a victim—is "as typical a sentencing factor as one might imagine." *Ibid.*; see also *id.* at 1229-1230.

Judges have always taken into account, in the exercise of their traditional discretion in imposing sentence, the amount of harm caused by a defendant's crime, and more particularly whether it resulted in a victim's injury or death. See, *e.g.*, *Payne* v. *Tennessee*, 501 U.S. 808, 820 (1991); *Williams* v. *Oklahoma*, 358 U.S. 576, 585-586 (1959) ("In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime. * * * Certainly, one of the aggravating circumstances involved in this kidnapping crime was the fact that petitioner shot and killed the victim in the course of its commission."). Indeed, the United

States Sentencing Commission, in drafting the present federal Sentencing Guidelines, expressly recognized that for crimes like robbery and assault, "the presence of physical injury made an important difference in pre-guidelines sentencing practice." Guidelines ch. 1, pt. A, ¶ 4(b), at 6 (Nov. 1, 1997).[9] The Guidelines preserve and regularize traditional practice, requiring courts to take account of "all harm that resulted" from the defendant's conduct, including "bodily injury," in determining a defendant's offense level. Guidelines § 1B1.3(a)(3) & application note 4; see also, *e.g.*, §§ 2A2.2(b)(3) (aggravated assault); 2A4.1(b)(2) (kidnaping, abduction, unlawful restraint); 2B3.1(b)(3) (robbery); 2B3.2 (extortion); *Miller* v. *Florida*, 482 U.S. 423, 426 (1987) (discussing state sentencing guidelines that assigned "points" based on factors including "the primary offense, * * * prior

[9] See also, *e.g.*, W. Rhodes & C. Conly, *Analysis of Federal Sentencing* X-13, XV-5, XV-11—XV-13 (U.S. Dep't of Justice, Fed. Justice Research Prog. Rep. No. FJRP-81/004, 1981) (indicating that, in an empirical study of federal sentencing decisions, victim harm significantly influenced the length of prison sentences for bank robbery and a group of other federal crimes); 28 C.F.R. 2.20 (1984) (former Parole Commission guidelines, taking resulting injury into account in grading the seriousness of, *e.g.*, assault (ch. 2(B)) and crimes primarily involving the destruction of property (ch. 3(A))); S. Shane-Dubow et al., *Sentencing Reform in the United States: History, Content, and Effect* 233, 235-236 (Nat'l Inst. of Justice 1985) (reporting that in a study of South Carolina judges, who had "a wide range of discretion in determining the type and length of sentence," "the two most important factors used by judges * * * were the use of a weapon and the threat of personal injury"); Model Penal Code § 7.01(2)(a) (Official Draft 1962) (listing, as the first consideration supporting withholding any prison sentence, whether "the defendant's criminal conduct neither caused nor threatened serious harm").

record, * * * and victim injury"). There can be no serious question that resulting injury or death is, like recidivism, "a traditional * * * basis for a sentencing court's increasing an offender's sentence." *Almendarez-Torres*, 118 S. Ct. at 1230.

Petitioner contends (Br. 15-19) that resulting injury should nonetheless be treated as an offense element under Section 2119 because the existence of such an injury, unlike an offender's criminal history, is an issue "closely related to and intertwined with the facts of the [present] offense" (Br. 17). Furthermore, he argues (Br. 16-18), there is greater need to treat bodily injury as an element, because it is more likely to be contested than a defendant's criminal history, and it will typically not have been the subject of a prior criminal proceeding, conducted under more stringent rules of proof. Those considerations do not, however, support the conclusion that Congress intended bodily harm to be an offense element under Section 2119, because statutory and guideline-based sentencing schemes frequently require that "fact[s] associated with the commission of the crime" (Pet. Br. 15), including resulting injury or death, be taken into account as sentencing factors.[10]

In *McMillan* v. *Pennsylvania*, 477 U.S. 79, 81 (1986), for example, the Court considered a state law

[10] Conversely, a factor relating solely to the "history of the offender" (Pet. Br. 15) may be an element of an offense. The statute that was at issue in *Almendarez-Torres*, for example, requires the government to prove that the defendant was previously "arrested and deported or excluded and deported." 8 U.S.C. 1326(a)(1) (Supp. II 1996). See also 18 U.S.C. 922(g) (1994 & Supp. II 1996) (specifying various historical facts, such as prior convictions, commitment to a mental institution, dishonorable military discharge, or renunciation of citizenship, that trigger federal criminal firearms prohibitions).

that mandated the imposition of a minimum term of imprisonment if the judge found at sentencing that the defendant had "'visibly possessed a firearm' during the commission of the offense." Rejecting a claim that the Constitution required the use of a heightened standard of proof "because visible possession is a fact 'concerning the crime committed' rather than the background or character of the defendant," the Court observed that "[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime without suggesting that those facts must be proved beyond a reasonable doubt." *Id.* at 92 (citation omitted).

McMillan cited *Proffitt* v. *Florida*, 428 U.S. 242 (1976), which involved a capital sentencing scheme in which the sentencing judge was required to take account of various aggravating and mitigating circumstances, many of them "intertwined with the facts of the offense" (Pet. Br. 17). *McMillan*, 477 U.S. at 92; see *Proffitt*, 428 U.S. at 248-249 n.6. Similar examples are easily multiplied. See, *e.g.*, Guidelines § 1B1.3(a)(1)-(2) (requiring consideration at sentencing of all offense-related conduct); *Miller*, 482 U.S. at 426 (describing state guidelines scheme); 18 U.S.C. 3592 (1994 & Supp. II 1996) (specifying aggravating and mitigating factors for federal capital sentencing, including, for instance, that a killing "involved torture or serious physical abuse"); 21 U.S.C. 841(b) (1994 & Supp. II 1996) (specifying different sentencing ranges for drug trafficking offenses depending on the type and quantity of drugs involved); Pet. Br. 12-13 (citing several federal criminal statutes that use serious bodily injury as a sentencing factor). The degree of

physical harm caused by a defendant's crime is precisely the sort of factual circumstance that courts "necessarily consider" (*McMillan*, 477 U.S. at 92) in imposing sentence. There is no reason to conclude that a statutory reference to resulting bodily harm in specifying maximum authorized punishments was intended to define a new offense element, simply because such harm will generally follow directly from the conduct that constitutes the offense of conviction.

Significantly, Section 2119 does not refer to bodily injury or death as an integral consequence of the defendant's offense conduct, as would a hypothetical statute that read: "Whoever, in the course of taking a motor vehicle, causes serious bodily injury to the occupant." As we have pointed out (see pages 17-18, *supra*), clauses (2) and (3) of Section 2119 instead authorize the imposition of higher sentences if serious bodily harm or death "results." That language focuses not on the offender's acts, but on their consequences.[11] It indicates that in this statute, injury or death is a harm to be considered at sentencing, not a separately prohibited aspect of the underlying criminal conduct.

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[11] For example, a carjacking victim might suffer a heart attack immediately after the offender drove away, or become disoriented, wander into traffic, and be hit by another car. Such consequences are readily encompassed by a sentencing provision tied to resulting harms, even if they are not intertwined with the offense conduct itself. See *United States* v. *Vazquez-Rivera*, 135 F.3d 172, 178 (1st Cir. 1998) ("[T]he choice of the word 'results' * * * suggests that Congress intended to cover a fairly broad range of consequences flowing from a carjacking.").

D. To The Extent They Are Relevant, Later Amendments To Section 2119 Also Support The One-Offense Construction

1. *Provision for capital punishment.* Petitioner argues (Br. 26-30) that resulting bodily injury must be construed to be an element of an aggravated offense defined by clause (2) of Section 2119 because in 1994, after the commission of the offense at issue in this case, Congress amended clause (3) of the statute to authorize imposition of the death penalty in cases in which "death results." See note 1, *supra* (describing 1994 amendments); see also Br. for the Nat'l Ass'n of Criminal Defense Lawyers (NACDL) 14-15. That argument is unsound. The penalty structure of Section 2119 applicable to this case was already in place before a capital sentence was added. The 1994 amendment of clause (3) is not the sort of legislative modification that may shed light on the proper interpretation of clause (2), as originally enacted: it does not "declare the meaning of earlier law," "seek to clarify an earlier enacted general term," "depend for [its] effectiveness upon clarification, or a change in the meaning of an earlier statute," or otherwise "reflect any direct focus by Congress upon the meaning of the earlier enacted provisions." *Almendarez-Torres*, 118 S. Ct. at 1227 (citing cases). The 1994 amendment is therefore "beside the point" here. *Ibid.*

Even if the 1994 amendment were potentially relevant to interpreting the statute under which petitioner was convicted and sentenced, it would not justify the conclusion that the non-capital sentencing provision in clause (2) was intended to create a separate criminal offense. First, Congress's 1994 addition of the words "or sentenced to death" to the range of penalties authorized by clause (3) for cases in which

"death results" does not indicate any intent to make resulting death an element of a separate carjacking offense (let alone any similar intent with regard to the "serious bodily injury" covered by clause (2)). Indeed, the portion of the 1994 amendment that *did* change the elements of the carjacking offense operated by substituting a new intent requirement for the former element of "possessing a firearm"—which appears in the initial, offense-defining paragraph of the statute. That change applies to all carjacking cases, not only to those in which death results. See Federal Death Penalty Act of 1994, Pub. L. No. 103-322, Tit. VI, § 60003(a)(14), 108 Stat. 1970. The 1994 amendments therefore preserve and emphasize the structural separation between the offense elements set out in the initial paragraph of Section 2119 and the sentencing factors set out in the following dependent clauses.

Second, contrary to petitioner's argument (Br. 27-28), nothing in the relationship between Section 2119, as amended, and the capital sentencing procedures that Congress also enacted in 1994, 18 U.S.C. 3591 *et seq.*, requires the conclusion that resulting injury in clause (2) should be treated as an element of a separate carjacking offense. The federal death penalty procedures apply whenever a defendant "has been found guilty of * * * any * * * offense for which a sentence of death is provided" (§ 3591(a)), if the government seeks the death penalty (see § 3593(a)) and if the sentencing jury or court makes certain required threshold findings concerning the defendant's mental state (see §§ 3591(a)(2)(A)-(D), 3593(b)). Those procedural provisions do not bear on the definition or construction of the elements of particular capital offenses; they simply provide a uniform mechanism for

determining whether or not to impose the death penalty in cases in which it is otherwise authorized. In this case, the basic language and structure of Section 2119, including the reference to resulting death in one of three dependent clauses relevant only to sentencing, was in place *before* the 1994 amendments added the possibility of capital sentencing. There is no reason to suppose that Congress intended those amendments to change the proper interpretation of Section 2119, or of any other statute that previously used resulting death as a factor relevant to the imposition of non-capital sentences.[12]

Finally, petitioner suggests (Br. 26-27) that resulting "death" must be a separate offense element after the 1994 amendments, because Congress's authorization of the death penalty in Section 2119(3) would otherwise be unconstitutional. He further suggests that if that constitutional claim is correct, it justifies construing Section 2119(2), even before 1994, to create a separate bodily-injury element. That constitutional theory of capital sentencing affords no basis for construing the resulting "serious bodily injury" factor to be an offense element.

[12] *United States* v. *Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998), petition for cert. pending, No. 97-9019 (filed May 7, 1998), is not to the contrary. See Pet. Br. 27-28 & n.24. *Rezaq* held that resulting death was an element of the air piracy offense defined by 49 U.S.C. App. 1472(n) (1988) (since revised and recodified at 49 U.S.C. 46502(b)). See 134 F.3d at 1134-1137. In reaching that conclusion, the court relied on the specific relationship between Section 1472(n) and 49 U.S.C. App. 1473(c)(2) (1988), a simultaneously enacted provision setting forth capital sentencing procedures applicable only in air piracy cases (although similar in kind to those now generally applicable under 18 U.S.C. 3591). See 134 F.3d at 1137. The court specifically distinguished resulting-death provisions in other statutes, including Section 2119. See 134 F.3d at 1136-1137 (citing *United States* v. *Rivera-Gomez*, *supra*, and *United States* v. *Williams*, *supra*).

While the Court has made clear that the death penalty may not be imposed on a robber or rapist "who, as such, does not take human life," *Enmund* v. *Florida*, 458 U.S. 782, 797 (1982); *Coker* v. *Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion), this Court's decisions have not addressed whether the Constitution would permit the imposition of a death sentence for a violent crime that results in a victim's death, where the finding of death is a sentencing factor that is determined by the jury beyond a reasonable doubt in the penalty stage of a bifurcated trial. Many of the constitutionally required determinations for imposing a capital sentence, however, may be made at the penalty stage. A defendant's participation in the crime resulting in death must be sufficiently substantial, for example, and his mental state sufficiently culpable, to make death a constitutionally proportionate punishment. *Tison* v. *Arizona*, 481 U.S. 137, 149-152, 156-158 (1987); *Enmund*, 458 U.S. at 797-801. But such findings of participation and culpability may be made at sentencing; they "do not affect the showing that [the government] must make at a defendant's *trial*," because they "do[] not concern the guilt or innocence of the defendant * * * and do[] not affect the * * * definition of any substantive offense." *Hopkins* v. *Reeves*, No. 96-1693 (June 8, 1998), slip op. 11.[13]

[13] See also *Cabana* v. *Bullock*, 474 U.S. 376, 384-388 (1986) (finding of intent to kill must be made "at some point in the process," but need not be made at trial or by jury); *Walton* v. *Arizona*, 497 U.S. 639, 649 (1990) (aggravating circumstances need not be denominated as elements of an offense, and need not be found by jury); *Hildwin* v. *Florida*, 490 U.S. 638, 640-641

The applicability of that constitutional analysis to the finding of a resulting death under the post-1994 version of Section 2119 is an open question. Certainly, the substantiality of a defendant's participation in a carjacking from which death resulted, and the culpability of his mental state, would have to be found before he could be sentenced to death, but the Eighth Amendment permits those findings to be made at sentencing.[14] This Court has never considered, however, whether the resulting death that is necessary to make capital punishment constitutionally proportional to a violent felony like rape or robbery must itself be treated as an element of the offense of conviction where the government seeks the death penalty.

This case presents no such constitutional issue. Petitioner's sentence is one of imprisonment, and it was enhanced for resulting serious bodily injury (not death) under Section 2119(2) (not (3)). The Court should not reach and determine the Eighth Amendment requirements for imposing a capital sentence

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(1989) (discussing *McMillan* v. *Pennsylvania*, *supra*); *Spaziano* v. *Florida*, 468 U.S. 447, 457-467 (1984); *Almendarez-Torres*, 118 S. Ct. at 1232 (citing these cases in rejecting argument that Constitution requires any factor that provides the legal predicate for an increased sentence to be treated as an offense element).

[14] After the 1994 amendments, the requirement of mental culpability would normally be satisfied by the jury's finding that a defendant acted "with the intent to cause death or serious bodily harm." See 18 U.S.C. 2119 (1994 & Supp. II 1996). In any case, applicable federal capital sentencing procedures would require the sentencing jury or court to find, beyond a reasonable doubt, that the defendant acted with a sufficiently culpable mental state, and that the victim died as an intended or "direct" result of the defendant's conduct. 18 U.S.C. 3591(a)(2)(A)-(D); see *Tison*, 481 U.S. at 157-158.

for carjacking under Section 2119(3) in the abstract; and however the existence of any doubt on that score might affect the interpretation of Section 2119(3) in a capital case, it can have no effect on the construction of Section 2119(2) here. Compare *Peretz* v. *United States*, 501 U.S. 923, 936 (1991).

2. *Modification of the definition of "serious bodily injury."* Although the 1994 amendment does not bear on the proper construction of Section 2119 before that amendment (and would not support petitioner's position even if it did), there is a later amendment to Section 2119 that does meet *Almendarez-Torres*'s criteria for potential relevance (see page 28, *supra*). That amendment, which clarified the specific penalty enhancement provision at issue in this case, supports the court of appeals' construction of the statute.

In June 1994, Reynaldo Vazquez Rivera forced a woman into her car, took her to a remote beach, and raped her at gunpoint before driving off with her car. *United States* v. *Rivera*, 83 F.3d 542, 544 (1st Cir. 1996). After a jury found Rivera guilty of violating Section 2119, the judge sentenced him to 25 years' imprisonment, based on his finding that the rape constituted "serious bodily injury." *Id.* at 545. The First Circuit affirmed Rivera's conviction, but it vacated his sentence on the ground that rape did not, by itself, constitute "serious bodily injury" under the statute, and that there was insufficient evidence to conclude that the rape had caused "extreme physical pain" or "protracted loss or impairment of the function of a * * * mental faculty." *Id.* at 547-549. The court's opinion explicitly adverted to its previous holding that "the alternative penalty provisions of § 2119 are sentence enhancers whose applicability is a matter for the judge, not the jury." *Id.* at 549 n.12.

The court of appeals rendered its decision in *Rivera* on May 21, 1996. 83 F.3d at 542. On June 19, 1996, Representative Conyers introduced legislation that became the Carjacking Correction Act of 1996, Pub. L. No. 104-217, 110 Stat. 3020, in order "to clarify that rape constitutes a serious bodily injury for the purposes of the penalty enhancement provided for in the federal carjacking statute." H.R. Rep. No. 787, 104th Cong., 2d Sess. 2 (1996); see note 1, *supra* (describing 1996 amendment); 142 Cong. Rec. H6531 (daily ed. June 19, 1996) (introduction of H.R. 3676). The committee report and floor statements on the Act focused directly on the First Circuit's interpretation of Section 2119, and they speak exclusively of sentence enhancement: there is no suggestion that the finding of serious bodily injury constituted an "element" of the carjacking offense, to be found by the trial jury rather than by the sentencing judge. See, *e.g.*, H.R. Rep. No. 787, *supra*, at 3 (agreeing with Judge Lynch, dissenting from denial of rehearing en banc, that the panel opinion "considered the definition of 'serious bodily injury' so narrowly that it produced a result 'wholly at odds with larger considerations of congressional *sentencing policy* and intent'") (emphasis added); 142 Cong. Rec. H10464 (daily ed. Sept. 17, 1996) (statement of Rep. Buyer, moving passage of the bill) ("This legislation does not create any new Federal crime * * *. It does not even create a penalty enhancement scheme under the carjacking statute—that enhancement already exists in the law. All this bill does i[s] make clear that anyone who commits rape during the course of a carjacking will get a longer * * * term in prison."); see also *id.* at H10463-H10465 (House debate and passage), S10892-S10893 (Senate floor statement and passage). The

President signed the Carjacking Correction Act into law on October 1, 1996. See 32 Weekly Comp. Pres. Doc. 1941.

Unlike the 1994 amendments on which petitioner seeks to rely, the 1996 Act "reflect[s] a[] direct focus by Congress upon the meaning of the earlier enacted provisions" of Section 2119 (see *Almendarez-Torres*, 118 S. Ct. at 1227), and specifically on the meaning of the term "serious bodily injury." Congress's discussion of that phrase, and of the operation of the carjacking statute, in reacting to the First Circuit's decision in *Rivera* make clear that Congress had no doubt that "serious bodily injury" was a factor relevant to the severity of sentencing, not an element of the carjacking offense. Thus, to the extent that evidence of later congressional views is relevant here, it supports the construction of Section 2119 adopted by the court below and other courts of appeals, not the construction urged by petitioner.

D. The Rule Of Lenity Does Not Support Adoption Of Petitioner's Construction Of Section 2119

Petitioner relies, finally, on the rule of lenity. Br. 30-31. It is by no means clear that defendants would be systematically favored by any construction of Section 2119 under which the government would be required to introduce at trial evidence concerning the seriousness of bodily injuries (or the fact of a death) resulting from the defendants' criminal conduct. Compare *Almendarez-Torres*, 118 S. Ct. at 1226 (noting that treating recidivism factor as an offense element would "risk[] unfairness" to defendants); *Monge* v. *California*, No. 97-6146 (June 26, 1998), slip op. 6 (observing that "fairness calls for defining a fact as a sentencing factor" where the fact could lead to an increased sentence, such as the quantity of drugs

involved in an offense, but the defendant might not wish to contest that fact while disputing guilt). In any event, as the Court has recently explained, the rule of lenity is not properly invoked simply because a statute requires consideration and interpretation to confirm its meaning. *Muscarello* v. *United States*, 118 S. Ct. 1911, 1919 (1998); see also *Caron* v. *United States*, 118 S. Ct. 2007, 2012 (1998) ("The rule of lenity is not invoked by a grammatical possibility."); *Moskal* v. *United States*, 498 U.S. 103, 107-108 (1990); cf. *Almendarez-Torres*, 118 S. Ct. at 1227-1228 (discussing doctrine of "constitutional doubt"). It applies only if there is such "grievous ambiguity or uncertainty" in a statute that, "after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 118 S. Ct. at 1919 (internal quotation marks and ellipsis omitted). In this case, as we have demonstrated, consideration of the "language, structure, subject matter, context, and history" of Section 2119 makes it at least "reasonably clear" that the statute is best construed as establishing a single crime of carjacking, with three possible statutory sentencing ranges depending on the degree of harm resulting from the offense. See *Almendarez-Torres*, 118 S. Ct. at 1223-1224. The rule of lenity accordingly has no application here.

II. NOTHING IN THE CONSTITUTION REQUIRES THIS COURT TO OVERRIDE CONGRESS'S ESTABLISHMENT OF GRADUATED SENTENCING RANGES FOR A SINGLE CARJACKING OFFENSE

Petitioner contends (Br. 22-42) that, whatever Congress may have intended when it enacted Section 2119, "the Constitution requires that serious bodily injury be deemed an element [of a separate offense] in order for the defendant to be imprisoned in excess of the 15-year maximum penalty set forth in 18 U.S.C. §2119(1)." Pet. Br. 32; see also NACDL Br. 16-19. Nothing in the Constitution or this Court's cases, however, requires the Court to adopt a construction of Section 2119 other than that produced by applying the normal tools of statutory analysis.

A. The Court's Constitutional Analysis In *Almendarez-Torres* Controls The Decision In This Case

This Court "has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." *Monge*, slip op. 6. Thus, the Court recently declined to hold that a state scheme under which sentences would be doubled for repeat offenders necessarily defined an "offense" with a prior-conviction "element." *Ibid.* That decision relied on the Court's thorough analysis of the issue in *Almendarez-Torres*, 118 S. Ct. at 1228-1233, which upheld the use of prior criminal convictions as sentencing factors that could increase the maximum sentence authorized for a federal crime from two years to ten or twenty, and which similarly rejected the argument "that any significant increase in a statutory maximum sentence * * * trigger[s] a Constitutional 'elements' requirement" (*id.* at 1232).

Like petitioner (Br. 32-35), the defendant in *Almendarez-Torres* relied heavily on this Court's decision in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). The Court acknowledged that *Mullaney*, "[r]ead literally, * * * suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt." 118 S.

Ct. at 1229. In the light of subsequent decisions, however, the Court found it "absolutely clear that such a reading of *Mullaney* is wrong." *Ibid.* Indeed, the Court pointed out that *Patterson* v. *New York*, 432 U.S. 197 (1977), "suggests the exact opposite" proposition—*i.e.*, "that the Constitution requires scarcely any sentencing factors to be treated" as elements. 118 S. Ct. at 1229. As the Court explained, although *Patterson* facially resembled *Mullaney*, its result (unlike *Mullaney*'s) favored the State, the difference turning on whether or not *the State itself* had, in framing its criminal provisions, defined the factor in question as an element of the offense of conviction. *Almendarez-Torres*, 118 S. Ct. at 1229.

The Court then considered its most closely analogous precedent, *McMillan* v. *Pennsylvania*, which held that a State could use visible possession of a firearm in committing an offense as a sentencing factor requiring the imposition of a mandatory minimum sentence. *Almendarez-Torres*, 118 S. Ct. at 1230. The Court first catalogued "the various features of [*McMillan*] upon which the Court's conclusion [in that case] arguably turned": that the statute did not "transgress the limits expressly set out in *Patterson*" (*i.e.*, the State did not "presume" the existence of any factor it had defined as an element of the offense, or otherwise "relieve the prosecution of its burden of proving guilt," see *McMillan*, 477 U.S. at 86-87); that the defendant did not face "a differential in sentencing ranging from a nominal fine to a mandatory life sentence"; that the sentencing scheme "did not alte[r] the maximum penalty for the crime," but merely "limit[ed] the sentencing court's discretion in selecting a penalty within the range already available to it"; that the statute did not by its terms

create a separate offense; and that it "gave no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense," but "simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the precise weight to be given that factor." 118 S. Ct. at 1230 (internal quotation marks and ellipsis omitted); see also *McMillan*, 477 U.S. at 86-87 (discussing *Patterson*). The Court noted that, with regard to these features, the case before it differed from *McMillan* only in that it did "alter[] the maximum penalty for the crime," and "create[d] a wider range of appropriate punishments." *Ibid.*

Focusing its analysis on those differences, the Court concluded that they did not "change the constitutional outcome." *Almendarez-Torres*, 118 S. Ct. at 1230. First, the Court noted that the sentencing factor at issue—recidivism—was "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Ibid.* Second, the Court pointed out that a statutory minimum sentence, like that at issue in *McMillan*, binds a sentencing judge, while an increased statutory maximum does not. Thus, "the risk of unfairness to a particular defendant is no less, and may well be greater, when a mandatory minimum sentence, rather than a permissive maximum sentence, is at issue." *Id.* at 1231. Third, the Court observed that the permissive sentencing range created by treating the recidivism provisions at issue to be sentencing factors was no broader than the ranges within which judges have traditionally exercised their discretion. *Id.* at 1231-1232. Finally, the Court again noted that the remaining *McMillan* factors supported the constitutionality

of the sentencing scheme at issue: "The relevant statutory provisions do not change a pre-existing definition of a well-established crime, nor is there any more reason here, than in *McMillan*, to think Congress intended to 'evade' the Constitution, either by 'presuming' guilt or [by] 'restructuring' the elements of an offense." *Ibid.* Accordingly, the Court rejected the claim that Congress could not constitutionally expand the range of sentences authorized for an offense without requiring the recidivism factor that triggered the enhancement to be charged and proved as a separate element of the underlying crime.

The Court's analysis in *Almendarez-Torres* applies equally to the constitutional question in this case.[15] As in both *Almendarez-Torres* and *McMillan*, the statute at issue here does not, by its terms, create multiple offenses. It likewise "creates no presumptions of [any] sort" in establishing the elements, and it does nothing to "relieve the prosecution of its burden of proving [the defendant's] guilt * * * of the [carjacking] crime for which he is to be punished." *McMillan*, 477 U.S. at 87; see *Almendarez-Torres*,

[15] The Court's decisions in *Almendarez-Torres* and *Monge* likewise preclude petitioner's attempt (Br. 42-43) to invoke the doctrine of "constitutional doubt" on the statutory construction question in this case. The Court declined to rely on that doctrine in *Almendarez-Torres* itself, 118 S. Ct. at 1227-1228, and there is no greater doubt concerning the constitutionality of the sentencing provisions at issue in this case. Indeed, in light of the holdings of *Almendarez-Torres* and *Monge* that recidivism *can* constitutionally be a sentencing factor that increases the maximum sentence to which a defendant is exposed, there is less reason here than in those cases to doubt that another traditional sentencing factor (resulting harm from an offense) can constitutionally do the same thing. Cf. *Almendarez-Torres*, 118 S. Ct. at 1238 (Scalia, J., dissenting) (noting that there is no "rational basis" for treating recidivism as an exceptional case).

118 S. Ct. at 1230, 1232; cf. *Montana* v. *Egelhoff*, 518 U.S. 37, 54-55 (1996) (plurality opinion). In framing the definition of armed carjacking in Section 2119, Congress did not "change a pre-existing definition of a well-established crime," or give any other indication that it was attempting to "'evade' the Constitution" by "'restructuring' the elements of an offense" so as to allow a sentencing "tail" to "wag[] the dog of the substantive offense." *Almendarez-Torres*, 118 S. Ct. at 1230, 1232; *McMillan*, 477 U.S. at 88; compare *Monge*, slip op. 2 (Scalia, J., dissenting).

As in *Almendarez-Torres*, there are also differences between Section 2119 and the sentencing scheme at issue in *McMillan*. But as in *Almendarez-Torres*, none of those differences changes the fundamental constitutional analysis.

B. The Range Of Available Sentences Under Section 2119 Is Not Unconstitutional

The sentencing factors set out in clauses (1)-(3) of Section 2119, like the enhancement provisions at issue in *Almendarez-Torres*, "create[] a wider range of appropriate punishments than did the statute in *McMillan*." 118 S. Ct. at 1230; see *McMillan*, 477 U.S. at 81-82 & n.2, 87-88. The overall sentencing range defined by Section 2119—up to life in prison—is also greater than that at issue in *Almendarez-Torres*, which involved a maximum sentence of 20 years' imprisonment. That difference is consistent, however, with the difference between unlawful reentry by a deported alien and carjacking, the latter being a violent crime that inherently involves the theft of valuable, easily transported property and poses a significant risk of serious bodily harm to its victims. Compare, *e.g.*, 18 U.S.C. 1201(a) (establishing sentencing range of "any term of years or * * * life"

for kidnapping, with mandatory life sentence or capital punishment "if the death of any person results").

The 15-year sentence authorized for any carjacking reflects the inherent seriousness of the crime. The second and third sentencing clauses increase that basic imprisonment range by about 66% in cases of bodily injury, or up to perhaps four times (for a young defendant) in cases where death results. The enhancements at issue in *Almendarez-Torres*, by contrast, increased an authorized maximum prison term of two years to ten or twenty years' imprisonment—a five- or ten-fold enhancement. See 118 S. Ct. at 1223-1224; see also *Monge*, slip op. 6. Finally, the discretion that a sentencing judge is authorized to exercise in imposing a sentence for carjacking is significantly constrained by the very statutory sentencing factors that are at issue here (resulting bodily injury or death), and further channelled by the applicable federal Sentencing Guidelines. See Guidelines § 2B3.1. Under these circumstances, the overall sentencing range authorized by Section 2119 creates no "significantly greater [risk of] unfairness" than the sentencing provisions at issue in *Almendarez-Torres* or *McMillan*, and its mere breadth cannot justify a different constitutional result.

C. The Traditional Sentencing Factors At Issue In This Case Are Not Constitutionally Different From The Recidivism Factor At Issue In *Almendarez-Torres*

Petitioner seeks to distinguish *Almendarez-Torres* on the ground that the recidivism factor involved in that case is constitutionally different from resulting injury or death. Br. 38-40; see also *Monge*,

slip op. 5 (Scalia, J., dissenting). Although plainly important to the Court's analysis, however, the specific subject matter was not, as petitioner argues (Br. 38), "the critical reason" for the Court's decision in *Almendarez-Torres*, and the reasoning of that decision applies equally to the resulting-injury factor at issue here.

First, as discussed above (see pages 23-25, *supra*), the degree of harm inflicted on victims—and, in particular, the infliction of serious or fatal bodily injury—is, like recidivism, "as typical a sentencing factor as one might imagine." See *Almendarez-Torres*, 118 S. Ct. at 1224. While victim injury may certainly be made an element of an offense, petitioner cannot seriously dispute that there is also nothing in the least unusual about using it as a factor in determining the appropriate severity of a defendant's sentence. The traditional nature of the subject matter therefore provides no basis for distinguishing between resulting injury and recidivism for purposes of *Almendarez-Torres*'s constitutional analysis.

Petitioner also renews (Br. 32, 38-40), in the constitutional context, his statutory argument that resulting injury differs from recidivism because it is "a fact of an offense" rather than "a characteristic of the offender." That argument for a constitutional distinction, and the related argument that resulting injury may require more factfinding than criminal history, are unpersuasive for reasons that we have already discussed. See pages 25-27, *supra*; *McMillan*, 477 U.S. at 92 (rejecting argument that the government was required to prove visible possession of a firearm by more than a preponderance of the evidence because it was "a fact concerning the crime committed rather than the background or character of the defendant")

(internal quotation marks omitted). Nor is there merit in petitioner's suggestion (Br. 39-40) that the admission at trial of evidence relating to resulting injury or death would pose less risk of prejudice to the defendant than the admission of evidence of recidivism. Whether that is true depends largely on whether the same evidence would be admissible for some purpose other than determining the appropriate sentencing range (such as, in a carjacking case, to show the use of "force and violence"). *Almendarez-Torres* itself did not discuss possible prejudice to the defendant as part of its constitutional analysis (compare 118 S. Ct. at 1226 with *id.* at 1228-1233). By contrast, when the Court most recently adverted to the issue of possible prejudice, it commented that the avoidance of such prejudice formed one of the reasons for rejecting "an absolute rule that a [maximum-sentence-increasing] enhancement constitutes an element of the offense"; and it illustrated that point with an example involving, not recidivism, but the quantity of controlled substances involved in a drug offense—a fact intimately related to the circumstances of the crime. *Monge*, slip op. 6.

In any event, nothing in *Almendarez-Torres*'s constitutional analysis turns on the distinction between criminal history and the circumstances of the offense. See 118 S. Ct. at 1228-1233. To the contrary, in refusing to adopt a constitutional rule that any factor that increases the maximum authorized penalty should be treated as an element of the offense, the Court noted that any such principle "would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty." 118 S. Ct. at 1232. Those factors are, of course, often

ones that relate closely to "the circumstances of the offense" (Pet. Br. 38). See, *e.g.*, *Walton* v. *Arizona*, 497 U.S. 639, 645 (1990) (findings included that murder was committed "in an especially heinous, cruel, or depraved manner" and for pecuniary gain); *Hildwin* v. *Florida*, 490 U.S. 638, 639 (1989) (per curiam) (similar); *Spaziano* v. *Florida*, 468 U.S. 447, 452 (1984) (similar).

D. Constitutional Values Provide No Reason For Treating Any Factor That Increases The Maximum Statutory Penalty Based On A Crime's Consequences As An Element Of The Offense

The "major difference" between the statute before the Court in *Almendarez-Torres* and the statute approved in *McMillan* was that the existence of a statutory sentencing factor under 8 U.S.C. 1326(b) "trigger[ed] an increase in the maximum permissive sentence, while the sentencing factor at issue in *McMillan* triggered a mandatory minimum sentence." 118 S. Ct. at 1231. The same distinction applies in this case as well. But just as in *Almendarez-Torres*, the difference between a permissive maximum and a mandatory minimum sentence "does not systematically, or normally, work to the disadvantage of a criminal defendant." *Ibid.* There is, correspondingly, no more reason here than in *Almendarez-Torres* to hold that the minimum/maximum distinction makes any constitutional difference. *Ibid.*; see also *Monge*, slip op. 6.

Whether a particular factor "alters the maximum penalty for the crime committed" (*McMillan*, 477 U.S. at 87-88), "triggers an increase in the maximum permissive sentence" (*Almendarez-Torres*, 118 S. Ct. at 1231), or "increases the maximum sentence to which a defendant is exposed" (*Monge*, slip op. 6) can-

not by itself provide a sound constitutional standard for determining whether that factor must be treated as an element of the offense of conviction. On its face, any such standard would reproduce the "literal[]" reading of *Mullaney* that *Almendarez-Torres* "absolutely" rejected. 118 S. Ct. at 1229; compare Pet. Br. 25-26. Any rule that Congress cannot prescribe subsidiary metes and bounds within an overall statutory sentencing range—as opposed to allowing judges to set any such intermediate limits in their own discretion—would render application of the mandatory federal Sentencing Guidelines unconstitutional, unless every factor taken into account in setting a defendant's Guidelines range were charged in the indictment and proved beyond a reasonable doubt at trial. See 18 U.S.C. 3553(b) (use of Guidelines ranges mandatory except for limited departure power); *United States* v. *R. L. C.*, 503 U.S. 291, 297-298, 306 (1992) (noting that Congress's sentencing directions are expressed through the work of the Sentencing Commission, as well as through other criminal statutes, and interpreting the phrase "maximum term of imprisonment * * * authorized" for juvenile offenders under 18 U.S.C. 5037(c) to be the maximum sentence under the Guidelines, not the statutory maximum); cf. *Miller* v. *Florida*, 482 U.S. at 432-435 (provisions of state sentencing guidelines sufficiently substantive for changes to invoke protection of Ex Post Facto Clause). Yet under this Court's decisions, that is incorrect. See, *e.g.*, *Edwards* v. *United States*, 118 S. Ct. 1475, 1477 (1998) (Guidelines instruct "*the judge* * * * to determine" type and quantity of drugs for which defendant is accountable "and then to impose a sentence that varies depending upon amount and kind"); *Watts*, *supra*; *Witte*, *supra*; cf. *Almen-*

darez-Torres, 118 S. Ct. at 1232 (discussing "existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here").

Petitioner does not take his argument to that logical but legally untenable conclusion. He does argue, however, that clause (1) of Section 2119 sets a "statutory maximum sentence" for his offense of 15 years' imprisonment. Pet. Br. 41. Even on the assumption that Congress clearly intended resulting injury or death to be treated as sentencing factors, not elements, he contends that the "statutory maximum" defined in clause (1) may not constitutionally be varied by clause (2) or (3) of the same Section, unless the factors they designate were charged in the indictment and proved at trial. *Id.* at 32, 41-42; see also NACDL Br. 17-19. But there is no sound reason, under the Constitution, to distinguish Section 2119 from a statute that sets a maximum penalty of life imprisonment for carjacking, subject to implementation under mandatory guidelines (promulgated by the Sentencing Commission) that establish escalating sentencing ranges based on whether the offense resulted in no serious injury, serious bodily injury, or death. Such a statute would satisfy the letter of petitioner's proposed standard that all conduct-related facts that bear on the "statutory maximum" must be "proven beyond a reasonable doubt at a trial by jury." Pet. Br. 32. But it would still leave the sentencing judge with the role of making significant findings about the facts relating to "the circumstance[s] of a crime," *id.* at 40, and increasing the punishment accordingly. A constitutional rule that prohibits the *direct* statutory guidance found in Sec-

tion 2119, but endorses broad statutory sentencing ranges for a defined crime subject to intermediate binding sub-ranges promulgated by a guidelines-issuing agency, protects no basic constitutional value. Compare *McMillan*, 477 U.S. at 92 ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance."); *Chapman* v. *United States*, 500 U.S. 453 (1991) ("Congress has the power to define criminal punishments without giving the courts any sentencing discretion.").

This is not to say that the Constitution places no limit on Congress's ability to define criminal offenses; indeed, this Court has explicitly indicated to the contrary. See, *e.g.*, *McMillan*, 477 U.S. at 86; *Monge*, slip op. 6 ("One could imagine circumstances in which fundamental fairness would require that a particular fact be treated as an element of the offense."). Beyond explicit restrictions such as the Ex Post Facto Clause (U.S. Const., Art. I, § 9, Cl. 3), and limits that follow from individual constitutional rights (*e.g.*, *United States* v. *Eichman*, 496 U.S. 310 (1990)), the Court has been alert to the possibility that a legislature might "change a pre-existing definition of a well-established crime" (118 S. Ct. at 1232), departing from the pattern of a traditional offense in a manner that would "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202; *Egelhoff*, 518 U.S. at 58-59 (Ginsburg, J., concurring in the judgment); *McMillan*, 477 U.S. at 88. Other principles, such as the Eighth Amendment's requirement of proportionality, or the requirement that a criminal law give fair notice of the

conduct it prohibits, might also apply to check hypothetical attempts at legislative evasion. See, *e.g.*, *Monge*, slip op. 2 (Scalia, J., dissenting) (all-purpose criminal prohibition of "knowingly causing injury to another," supplemented by extensive "sentencing factors" strongly resembling traditional offense elements). On a somewhat different point, the Court has also reserved the question whether some heightened degree of procedural protection might apply to the proof, at sentencing, of facts on which a judge bases a particularly dramatic increase in sentence (whether or not that increase is dictated by a statute or sentencing guideline). See *Almendarez-Torres*, 118 S. Ct. at 1233; *Watts*, 117 S. Ct. at 637-638 & n.2.

Any of these possible constitutional protections against legislative abuse of the criminal process must be applied with restraint, lest it interfere unduly with the traditional, and wholly legitimate, prerogative of the States and Congress to define both what constitutes criminal conduct and how that conduct, once established, is to be punished. Nothing in this case, however, requires the Court to address the outer constitutional boundaries of legislative power. Section 2119 supplies a clear definition of a serious criminal offense and specifies an overall sentencing range, subdivided into intermediate ranges that apply based on whether the court finds that serious bodily injury or death resulted from the defendant's commission of the crime. The crime itself is a variation on the traditional robbery offense, and the sentencing factors, also typical ones in the law, are reasonably related to penalties that reflect increased resulting harms. The statute gives fair notice of the conduct it prohibits and the penalties at issue, and there can be no claim here that petitioner lacked notice of the charges

against him at trial or of the facts in issue at sentencing. Because nothing in the Due Process Clause or any other provision of the Constitution requires that every factor relevant to such sentencing determinations be charged in the indictment or proved at trial, the statutory scheme under which petitioner was sentenced is constitutional.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NATHANIEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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A. THE LANGUAGE AND STRUCTURE OF SECTION 2119 DO NOT ESTABLISH A CONGRESSIONAL INTENT THAT SERIOUS BODILY INJURY BE TREATED AS A FACTOR FOR CONSIDERATION BY THE SENTENCING COURT, RATHER THAN AS AN ELEMENT OF THE OFFENSE TO BE PLEADED AND PROVED TO THE JURY

Respondent argues that the language and structure of Section 2119 establish that serious bodily injury was intended to be merely a sentencing factor. As to the language, respondent points to the use of the passive "if serious bodily injury results," rather than a more active verb form. Brief for the United States, pp. 17-18, 27. However, it is not uncommon for Congress to use passive language in establishing the infliction of serious bodily injury as an element of a federal offense. *See, e.g.*, 18 U.S.C. § 1153(a) ("resulting in serious bodily injury"); 18 U.S.C. § 1959(a) (same); 18 U.S.C. § 2332(c)(2) ("with the result that serious bodily injury is caused"); 18 U.S.C. § 2332b(a)(1)(A) ("resulting in serious bodily injury"). The use of a particular verb form is not a reliable indicator of Congress's intent with regard to the issue before the Court.

As to the structure, respondent places great reliance on the point that subsections (1) through (3) of Section 2119 do not stand on their own. Brief for the United States, pp. 15-16. However, the first paragraph of the statute, ending in "shall," cannot stand on its own either. Unlike other statutory provisions defining criminal conduct, that paragraph does not state that the conduct described "shall be unlawful" (*e.g.*, 18 U.S.C. § 922(g)), "is prohibited" (18 U.S.C. § 42), or "shall be punished" in a particular way (*e.g.*, 18 U.S.C. § 2381) or as provided in another section or subsection (*e.g.*, 18 U.S.C. § 1751), nor

does it state that anyone engaging in the conduct described "is guilty of" a particular crime (*e.g.*, 18 U.S.C. § 1621 (perjury)) or of a particular class of crime (*e.g.*, 18 U.S.C. 2258 (Class B misdemeanor); 18 U.S.C. § 474 (Class B Felony)). Thus, the opening paragraph of the statute does not establish a federal criminal offense until it is combined with one of the co-equal subsections numbered (1) through (3). When so combined, the paragraph establishes three separate carjacking offenses, carrying differentiated penalties determined by particular circumstances of the crime.

In order to establish three separate offenses, respondent would require Congress to structure the statute as follows:

> (1) Whoever, possessing a firearm as defined . . . takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall be . . . imprisoned not more than fifteen years,
>
> (2) Whoever, possessing a firearm . . . takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, if serious bodily injury results, shall be imprisoned not more than 25 years.
>
> (3) Whoever, possessing a firearm . . . takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, if death results, shall be imprisoned for any number of years up to life.

Such a statutory scheme would have been unnecessarily cumbersome. The fact that Congress chose a simpler, more direct method to achieve its intended result provides no reason to deprive a defendant of significant constitutional protections.

In ascribing such great weight to the structure of the statute, respondent ignores the fact that Congress has utilized several different statutory schemes to incorporate the concept of bodily injury into federal criminal statutes. *See* Brief for Petitioner, p. 14. The absence of any consistent pattern in this regard counsels against undue reliance on the structure of Section 2119 as evidence of Congressional intent on whether serious bodily injury was to be an element of the offense to be pleaded and proved to the jury or merely a factor considered by the sentencing court.

Respondent also claims that Section 2119 "is structured very much like statutes that all would agree set out only sentencing factors," citing 8 U.S.C. § 1324(a) and 18 U.S.C. § 247. Brief for the United States, p. 18; *see also id.*, p. 9. There is no such agreement. Whatever the similarity of those statutes to Section 2119, petitioner vehemently disagrees that the two statutes set out *only* sentencing factors.

In fact, 18 U.S.C. § 247 resembles the hypothetical statute envisioned by the dissenting justices in *Monge* v. *California*, 118 S. Ct. 2246, 2255 (1998). Section 247 establishes a crime of intentionally defacing, damaging or destroying religious real property or intentionally obstructing, by force or threat, any person in the free exercise of religious beliefs (§ 247(a)-(c)), with a basic penalty of a fine or imprisonment for not more than one year or both (§ 247(d)(4)). The statute then increases the maximum sentence to 20 years where bodily injury to any

person results or a dangerous weapon, explosives or fire is used (§ 247(d)(3)); to 40 years if bodily injury results and fire or an explosive is used (§ 247(d)(2)); and to any term of years, life imprisonment, or the death penalty if death results or if the defendant's acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill (§ 247(d)(1)). It is difficult to conceive of a court holding that the operative facts of the crime that increase the statutory maximum punishment from 1 year, to 20 years, 40 years, life imprisonment or execution need not be pleaded in an indictment and proved to a jury beyond a reasonable doubt.

Similarly, 8 U.S.C. § 1324(a) establishes a crime of bringing in, transporting, or harboring certain aliens (§ 1324(a)(1)(A)), with a basic maximum sentence of 5 years (§ 1324(a)(1)(B)(ii)). The statute then increases the maximum penalty for certain violations to 10 years when done for purposes of commercial advantage or private financial gain (§ 1324(a)(1)(B)(i)); for certain violations to 20 years where the defendant causes serious bodily injury or places in jeopardy the life of any person (§ 1324(a)(1)(B)(iii)); and for certain violations to any term of years or life imprisonment where death results (§ 1324(a)(1)(B)(iv)). Again, the operative facts of the crime that trigger an increase of the maximum penalty from 5 years to life either were intended to be treated as elements of an aggravated offense, or are constitutionally required to be so treated.

Thus, respondent's protestations notwithstanding, the language and structure of Section 2119 are too slender a reed upon which to base a decision to deny carjacking defendants the basic constitutional protections of grand

jury indictment, trial by jury, and proof beyond a reasonable doubt.[1]

B. UNLIKE RECIDIVISM, BODILY INJURY TO A VICTIM OF THE OFFENSE HAS NOT TRADITIONALLY BEEN RESTRICTED TO USE AT SENTENCING; RATHER, A VICTIM'S BODILY INJURY HAS HISTORICALLY BEEN AN ELEMENT OF AN AGGRAVATED FORM OF ROBBERY CARRYING A GREATER MAXIMUM SENTENCE

In an attempt to have this Court construe the carjacking statute within the rule of *Almendarez-Torres* v. *United States*, 118 S. Ct. 1219 (1998), respondent repeatedly states that bodily injury, like recidivism, has been a traditional basis for enhancing a defendant's sentence and is "as typical a sentencing factor as one might imagine." *See* Brief for the United States, pp. 9, 23, 25, 39, 43 (quoting *Almendarez-Torres*, 118 S. Ct. at 1224). This ignores the role that bodily injury has historically played in defining robbery offenses and misstates the import of *Almendarez-*

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[1] In reply to petitioner's reliance on the rule of lenity (Brief for Petitioner, pp. 30-31), respondent questions whether "defendants would be systematically favored" by requiring the government to plead and prove serious bodily injury (or death resulting). Brief for the United States, p. 35. However, as respondent elsewhere admits, such evidence would likely be admissible in any event "to show the use of 'force and violence.' " *Id.*, p. 44. In any event, any defendant who chooses not to avail himself of the right to require the government to plead and prove serious bodily injury (or death resulting) has procedural devices available to accomplish that goal. *See Almendarez-Torres*, 118 S. Ct. at 1243 (Scalia, J., dissenting).

Torres. Although physical harm to a victim has undoubtedly been a factor that judges have considered in determining what sentence to impose within the statutory range in a given case, such injury, unlike a defendant's criminal record, has not traditionally been *limited* to sentencing. State statutes have long incorporated the harm caused to a victim as an element of the offense of aggravated robbery with an increased sentence. *See* Brief for Petitioner, Appendix.[2] In *Almendarez-Torres*, the Court made it clear that recidivism's traditional use as a sentencing factor was important *only* because recidivism also *had not been traditionally used as an element of an offense*. After noting that a defendant's prior commission of a crime is "one of the most frequently found factors that affects sentencing" (118 S. Ct. at 1229), the Court went on to emphasize that there was "no statute that clearly makes recidivism an offense element. . . . "; *id.* at 1224;[3] *see also id.* at 1231 ("recidivism 'does not relate to the commission of the offense, but goes to the punishment only, and therefore . . . may be subsequently decided' ") (quoting *Graham* v. *Virginia*, 224 U.S. 616, 629 (1912); *id.* ("[A] charge under a recidivism statute does not state a separate offense, but goes to punishment only") (quoting *Parke* v. *Raley*, 506 U.S. 20, 27 (1992)); *id.* ("Congress reflecting this tradition, has never, to our knowledge, made a defendant's recidivism an element of an offense

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[2] Respondent mistakenly characterizes the appendix as setting forth "the state law of *assault*." Brief for the United States, p.21, n.8 (emphasis added).

[3] The Court noted that the one exception is a statute where the charged conduct would not otherwise be unlawful in the absence of the prior conviction, such as a statute that criminalizes a felon's possession of a firearm, citing 18 U.S.C. § 922(g)(1).

where the conduct proscribed is otherwise unlawful"); *see also United States* v. *Forbes*, 16 F.3d 1294, 1299 (1st Cir. 1994) ("proof of a defendant's prior felony convictions typically is the type of individual background information considered by the judge, *and not the jury*") (emphasis added). With this historical context, the Court concluded that Congress did not intend recidivism to be an element of an offense and that the Constitution did not require that recidivism be so treated. *See Almendarez-Torres*, 118 S. Ct. at 1224-1226 ; *id.* at 1231 ("to hold that the Constitution requires that recidivism be deemed an 'element' of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as 'go[ing] to the punishment only' ") (quoting *Graham*, 224 U.S. at 587-588).

Unlike recidivism, bodily injury has historically been used as an element of an aggravated form of a robbery offense. Numerous state statutes have set forth an aggravated version of robbery, with a greater maximum sentence, where the prosecution must prove to a jury beyond a reasonable doubt that the offense involved some type of bodily injury or physical harm to the victim of the offense. *See* Brief for Petitioner, Appendix. Thus, whereas the historical use of recidivism for sentencing purposes was cited by the *Almendarez-Torres* court as favoring an interpretation of the prior conviction element in 8 U.S.C. § 1326(b)(2) as merely a sentencing factor, the historical treatment of bodily injury as an element of the offense of aggravated robbery militates in favor of construing subsection (2) of § 2119 as setting forth an element of an aggravated carjacking offense.

Moreover, the nature of the particular factor here weighs heavily toward finding serious bodily injury to be an ingredient of a 25-year carjacking offense. In contrast

to recidivism, bodily injury is an often-disputed circumstance of the offense, one that is not readily verifiable and is best determined by a jury under the standards and protections accorded at trial. *See* Brief for Petitioner, pp. 15-19. In this regard, the Courts of Appeals have often construed other facts of an offense, which (like serious bodily injury) trigger a greater maximum penalty, to be elements of an aggravated offense. *See* Brief for Petitioner, p. 17 n. 12; *see also Aderhold* v. *Pace*, 65 F.2d 790, 791 (5th Cir. 1933) (amount of intoxicating liquor sold, which increased the maximum sentence, must be pleaded in indictment, because "to punish one for all of a crime where only a part of it is charged is to punish him without accusation," citing 1 Bishop's Cr. Pro. §§ 77, 80, 84).

Such treatment in no way restricts the Sentencing Guidelines' use of "bodily injury" as a factor that a sentencing court may consider in determining a defendant's guideline offense level and the defendant's ultimate sentence.[4] A circumstance or fact of a crime may be both an element of an offense and a factor that a court relies on in deciding to impose a more severe sentence. Often, a single statutory element, such as "serious bodily injury" in the carjacking statute, is divided into varying gradations in the sentencing guideline applicable to that offense so that the sentencing judge must make additional, precise findings on issues not resolved by a jury's general verdict of guilty. *See, e.g.*, § 2B3.1(c)(3) (in the guideline for robbery offenses, the enhancement for

[4] This Court has recognized that a fact regarding the offense that triggers an increase in the sentencing range may require different treatment under the Constitution than a fact used to fix a sentence within the sentencing range. *E.g., Edwards* v. *United States*, 118 S. Ct. 1475, 1477-1478 (1998).

bodily injury provides increases in the base offense level of two levels for "Bodily Injury," four levels for "Serious Bodily Injury," and six levels for "Permanent or Life-Threatening Bodily Injury"); *compare* 18 U.S.C. § 641 (felony theft of government property valued at more than $1,000 or more) *with* § 2B1.1(b) (various degrees of enhancement for amount of loss).[5] A sentencing judge may also consider the particular circumstances regarding an element of an offense in determining where within the guideline range to sentence a defendant and, with certain limits, whether to depart upward from the guideline range. *See, e.g.*, § 5K2.2 (upward departure for significant physical injury); *see generally* § 1B1.4 ("In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the . . . *conduct of the defendant*, unless otherwise prohibited by law.") (emphasis added). Thus, a decision that serious bodily injury is an element of an

[5] The jury's determination whether a particular element has been proven beyond a reasonable doubt is largely independent from the sentencing judge's decision whether and to what degree a particular aggravating sentencing factor has been shown to exist by a preponderance of the evidence. In a carjacking case, a jury's verdict that a defendant is guilty of carjacking with serious bodily injury would not control the court's decision under § 2B3.1(b)(3) whether to add just 4 levels for "Serious Bodily Injury" or 6 levels for "Permanent or Life-Threatening Bodily Injury" (or 5 levels for injury falling between the two categories). Similarly, a jury's verdict of guilty on a simple carjacking offense (without a finding of serious bodily injury) would not preclude the court from enhancing the defendant's sentence for some degree of bodily injury under the robbery guideline within the 15-year statutory maximum.

aggravated carjacking offense would in no way undermine the Sentencing Guidelines, as respondent seems to suggest. *See* Brief for United States, pp. 23-25. On the contrary, the Sentencing Commission has fully considered the varying degrees of this element's presence in defining the specific offense characteristics of the sentencing guideline applicable to carjacking.

In short, because bodily injury (unlike recidivism) has not traditionally been limited to consideration at sentencing, but rather has generally been incorporated into robbery statutes as an element of an aggravated version of the offense, this Court's decision in *Almendarez-Torres* is readily distinguishable on the issue presented herein.

C. THE FEDERAL ROBBERY STATUTES UPON WHICH THE CARJACKING STATUTE IS MODELED TREAT A FACT OF THE CRIME THAT INCREASES THE MAXIMUM PUNISHMENT AS AN ELEMENT OF AN AGGRAVATED ROBBERY OFFENSE

As respondent concedes, Congress looked to the other federal robbery statutes in its drafting of Section 2119. Brief for the United States, pp. 20-21 and fn. 8. Three of these statutes, all of which are placed (along with Section 2119) in Chapter 103 of Title 18 of the United States Code entitled "Robbery and Burglary," establish a particularized form of robbery,[6] and then divide the particularized robbery into a basic offense and one or more

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[6] The other two robbery statutes in Chapter 103 define general robbery offenses: Section 2111 (robbery within the special and territorial jurisdiction of the United States) and Section 2112 (robbery of personal property belonging to the United States). Three other sections within the chapter define

aggravated offenses. Thus, Section 2113(a) establishes the basic offense of bank robbery with a maximum penalty of 20 years; an aggravated version, where the defendant is shown to have assaulted any person or put any person's life in jeopardy by use of a dangerous weapon or device, carries a maximum penalty of 25 years (§ 2113(d)); and another aggravated version, where death results, has a maximum punishment of death or life imprisonment (§ 2113(e)). Section 2114 establishes the basic offense of postal robbery with a maximum penalty of 10 years; an aggravated version, where the defendant is shown to have wounded the victim or put his life in jeopardy by use of a dangerous weapon or is a recidivist, carries a maximum penalty of 25 years. Section 2118(a) establishes the basic offense of pharmacy robbery with a maximum penalty of 20 years; an aggravated version, where the defendant is shown to have assaulted any person or put in jeopardy the life of any person by use of a dangerous weapon or device, has a maximum penalty of 25 years (§ 2118(c)(1)); and another aggravated version, where the defendant is shown to have killed any person, carries a maximum penalty of life (§ 2118(c)(2)).

With regard to each of these particularized robbery statutes, the fact of the crime that increases the maximum penalty over that for the basic robbery offense has been held to be an element of the aggravated offense. Thus, assaulting another or putting another's life in jeopardy by use of a dangerous weapon or device has been held to be an element of the offense of aggravated bank robbery

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burglary offenses: Section 2115 (burglary of a post office), Section 2116 (burglary of a post-office car, steamboat or vessel), and Section 2117 (burglary of a railroad car, vessel, aircraft, etc.).

under Section 2113(d). *See, e.g., United States* v. *Ray*, 21 F.3d 1134, 1136-1139 (D.C. Cir. 1994); *see also* cases cited in Brief for Amicus Curiae National Association of Criminal Defense Lawyers, pp. 12-13.[7] Similarly, placing a postal worker's life in jeopardy by use of a dangerous weapon has been held to be an element of aggravated postal robbery under Section 2114. *See, e.g., United States* v. *Lawrence*, 699 F.2d 697, 701 (5th Cir.), *cert. denied*, 461 U.S. 935 (1983); *United States* v. *Crawford*, 576 F.2d 794, 798 (9th Cir.), *cert. denied*, 439 U.S. 851 (1978); *United States* v. *Davis*, 560 F.2d 144, 147 (3d Cir.), *cert. denied*, 434 U.S. 839 (1977). Finally, as to Section 2118, the Sixth Circuit has stated that "since the pharmacy burglary statute was modeled after the federal bank robbery statute . . . , we look to interpretation of that statute for guidance," and has approved the district court's instruction which defined the aggravating factor of assault or putting another's life in jeopardy by use of a dangerous device, which was necessary to increase the statutory maximum to 25 years. *United States* v. *Mills*, 1 F.3d 414, 419, 420 (6th Cir. 1993).

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[7] As noted by the D. C. Circuit in *United States* v. *Canty*, 469 F.2d 114, 127 (D.C. Cir. 1972):

> The federal bank robbery statute establishes a comprehensive scheme for prosecuting and punishing persons who rob federally-insured banks. The scheme subdivides the offense into a series of steps – a continuum running from entry with intent to rob, to robbery by force and violence, to robbery with the aid of a dangerous weapon, to robbery resulting in death or kidnapping. The scheme provides a penalty for each step of the offense, and increases the penalty as the offense becomes more aggravated. There are no gaps between the steps.

Given that Congress looked to the other federal robbery statutes in Chapter 103 in drafting Section 2119, and given that the facts of the crime which trigger an increase in the maximum penalties in each of the other particularized robbery statutes located in Chapter 103 have all been held to be elements of the offense, not mere sentencing factors, there is no reason that the infliction-of-serious-bodily-injury factor in Section 2119 should be treated otherwise.

D. THE LEGISLATIVE HISTORY SURROUNDING THE ENACTMENT OF SECTION 2119 DOES NOT PROVIDE RELIABLE EVIDENCE THAT CONGRESS INTENDED THAT CARJACKING DEFENDANTS BE DENIED TRADITIONAL CONSTITUTIONAL SAFEGUARDS ON THE QUESTION OF SERIOUS BODILY INJURY

Respondent recognizes that the legislative history surrounding the enactment of Section 2119 nowhere directly addresses whether serious bodily injury was intended to be a sentencing factor or an element of the offense. Indeed, respondent acknowledges that the entire discussion of the carjacking statute, as opposed to other sections of the Anti Car Theft Act, is best termed "brief." Brief for the United States, p. 22. This very limited and unfocussed legislative history is simply too "imprecise" to provide any reliable indication of congressional intent on the issue before the Court. *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U.S. 267, 280 (1994).[8]

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[8] In finding serious bodily injury to be a sentencing factor, the Ninth Circuit relied not only on the legislative history of the statute, but also its titles and subtitle. *See* J. A. 31. Respondent

E. THE 1994 AMENDMENTS CONFIRM THAT SERIOUS BODILY INJURY AND DEATH WERE MEANT TO BE ELEMENTS OF AGGRAVATED CARJACKING OFFENSES

In 1994 Congress simultaneously added the death penalty as an alternative punishment under Section 2119(3) where death results, and enacted the federal death penalty statute, 18 U.S.C. § 3591 *et seq.* Section 3591(a) authorized a death sentence, after a jury verdict of death in a penalty hearing under Section 3593, for a "defendant who has been found guilty of – . . . (2) any other offense for which a sentence of death is provided." Since carjacking is not "an offense for which a sentence of death is provided" unless a death has resulted, a defendant cannot be "found guilty" of that crime, and therefore be subjected to a subsequent penalty hearing on the question of death, unless the jury determining guilt or innocence as to the carjacking offense also determines whether death has resulted.

Thus, as a matter of statutory construction following the 1994 amendments, the fact of death resulting under § 2119(3) must be pleaded and proved to the jury as part of the carjacking prosecution.[9] Respondent suggests no reason why serious bodily injury under § 2119(2) should be treated differently. *See Almendarez-Torres*, 118 S. Ct. at

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has appropriately abandoned the latter argument. *See* Brief for Petitioner, pp. 20-21 and fn. 14.

[9] The alternative interpretation would require "an ornate, three-stage procedure," where the jury would determine guilt as to the carjacking charge, the judge would then conduct a hearing on whether death resulted, and the jury would then determine penalty in a sentencing hearing. *See United States* v. *Rezaq*, 134 F.3d 1121, 1136 (D.C. Cir. 1998), petition for cert. pending No. 97-9019 (filed May 7, 1998).

1239 n.3 (Scalia, J., dissenting). Petitioner agrees with respondent that "[t]here is no reason to suppose that Congress intended those amendments to *change* the proper interpretation of Section 2119." Brief for the United States, p. 30 (emphasis added). Rather, the 1994 amendments *confirm* that both death-resulting and serious bodily injury were originally intended to be elements of aggravated carjacking offenses when the statute was enacted by Congress in 1992.[10]

F. THE CONSTITUTION REQUIRES THAT SERIOUS BODILY INJURY BE DEEMED AN ELEMENT OF A § 2119(2) CARJACKING OFFENSE CARRYING A 25-YEAR MAXIMUM PENALTY

Relying largely on *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), and *Almendarez-Torres*, 118 S. Ct. 1219, respondent argues that there is nothing in the Constitution or this Court's cases that requires that a fact of an offense that significantly increases the maximum statutory penalty be treated as an element of that offense. Brief for United States, pp. 37-50. But neither *McMillan* nor *Almendarez-Torres* are controlling. The Court's decision in

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[10] Respondent's argument (pp. 33-35) that a 1996 amendment to Section 2119 confirms that serious bodily injury was not intended to be an element of the offense is meritless. The 1996 amendment, enacted to overrule the Court of Appeals decision in *United States* v. *Rivera*, 83 F.3d 542 (1st Cir. 1996), and appropriately entitled the Carjacking *Correction* Act of 1996, changed the definition of "serious bodily injury" in the carjacking law to include rape. Neither the amendment itself nor its limited legislative history addressed the statutory role of serious bodily injury, *i.e.*, whether, as originally defined or as later modified, it was meant to be an element of the offense, with the attendant constitutional safeguards, or merely a factor for consideration at sentencing.

McMillan is readily distinguishable because the statute involved there raised the statutory *minimum* penalty, not the *maximum*. As discussed in the Brief for Petitioner at pp. 37-40 and section B of this reply brief, the holding in *Almendarez-Torres* also is inapplicable here, because that case concerned the defendant's prior criminal record, rather than a fact relating to the commission of the charged offense. *See also Monge* v. *California*, 118 S. Ct. at 2257 (Scalia, J., dissenting) (noting that *Almendarez-Torres* and *Monge* do not address the open "question whether 'enhancements' that increase the maximum sentence and that do not involve the defendant's prior criminal history are valid"). Rather, the present case raises the issue left open in those cases, *i.e.*, whether a fact relating to the offense (rather than to the background of the offender) that significantly increases the statutory maximum sentence must be treated as an element of the offense.[11] For the reasons stated in the Brief for Petitioner at pp. 32-42, if the Court determines that serious bodily injury is not an element of the carjacking statute under principles of statutory construction, the Court must require that this fact that significantly raises the statutory maximum be treated as an element of the offense, a rule

[11] A finding of "serious bodily injury" or a resulting "death" certainly causes a significant increase in the statutory maximum sentence. As the statute read when applied to petitioner, the 15-year statutory maximum increased two-thirds to 25 years for serious bodily injury under section 2119(2) and to life imprisonment where death resulted under section 2119(3). As amended in 1994, section 2119(3) authorizes a maximum sentence of execution upon a finding that death resulted from the offense.

which the Court has long intimated is required by the Constitution. *See McMillan*, 477 U.S. at 87-88;[12] *Mullaney*

[12] Despite respondent's suggestion to the contrary, Brief for United States, pp. 38-40, *McMillan*'s reasoning cannot be divided into discrete "factors," so that the effect that a fact of the offense has on the statutory maximum is viewed as just one of many factors the Court considers in deciding whether the Constitution requires that the fact be treated as an element of the offense. Rather, a fair reading of the *McMillan* opinion reveals that an essential basis of the Court's ruling was that the fact in question did not raise the statutory maximum. *McMillan*, 477 U.S. at 87-88; *see also Schad* v. *Arizona*, 501 U.S. 624, 644 n.9 (1991) (characterizing *McMillan*'s holding as relying on fact that the statute in issue did not alter the maximum penalty); *Witte* v. *United States*, 515 U.S. 389, 401 (1995) (same).

Respondent correctly notes that the Court in *Monge* stated that the Court "has rejected an *absolute* rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." Brief for United States, p. 37 (quoting *Monge*, 118 S. Ct. at 2250-2251) (emphasis added). But this dicta is properly read as simply noting that the Court in *Almendarez-Torres* established an exception to the rule for cases where the fact in issue relates to the prior criminal record of the defendant, not a circumstance of the charged offense.

The government also contends that the constitutional rule that a fact of an offense that increases the statutory maximum must be treated as an element of the offense is "anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty." Brief for United States, p. 44 (quoting *Almendarez-Torres*, 118 S.Ct. at 1232). But the Court has held only that, once a defendant has been convicted of a capital offense, a judge, rather than a jury, may determine the existence of "aggravating factors" in deciding whether a sentence of death or some lesser sentence is appropriate. *See Walton* v. *Arizona*, 497 U.S. 639 (1990); *Hildwin* v. *Florida*, 490 U.S. 638 (1989) (per curiam); *Spaziano* v. *Florida*, 468 U.S. 447 (1984). The Court has never permitted a judge to determine the existence of

v. *Wilbur*, 421 U.S. 684, 698 (1975); *Specht* v. *Patterson*, 386 U.S. 605 (1967).

Respondent contends that such a rule would still permit legislatures to circumvent the constitutional requirement that facts of the crime that increase the statutory maximum must be pleaded and proved at a jury trial simply by enacting new laws that establish a single general crime with a maximum penalty of life imprisonment, where the sentencing judge would determine whether certain facts of an offense justify an enhanced sentence within the statutory sentencing range. Brief for United States, pp. 46-47. However, such a statute is not before this Court and would raise other constitutional questions not applicable here. For example, mandatory "sentencing factors" in this type of statute might play such a significant role in determining the ultimate sentence that the Constitution would require that they be proved beyond a reasonable doubt. *See Almendarez-Torres*, 118 S. Ct. at 1230 ("we express no view on whether some heightened standard of proof might apply to sentencing determinations

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the fact of the offense that makes it a capital offense, *i.e.*, the fact that makes the defendant *eligible* for the death penalty. A defendant has a right to have that fact pleaded and proved beyond a reasonable doubt at a jury trial.

In any event, at the very least there are certainly strong doubts whether the carjacking statute would withstand constitutional scrutiny if serious bodily injury were construed to be merely a sentencing factor. Thus, under the doctrine of constitutional doubt, the Court must interpret the statute as requiring that serious bodily injury be treated as an element of the offense. *See Almendarez-Torres*, 118 S. Ct. at 1228 ("[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score") (quoting *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

which bear significantly on the severity of sentence"); *Witte*, 515 U.S. at 403 ("Petitioner does not argue that the range fixed by Congress is so broad, and the enhancing role played by the relevant conduct so significant, that consideration of that conduct in sentencing has become 'a tail that wags the dog of the substantive offense.' " (quoting *McMillan*, 477 U.S. at 88).) Moreover, under this Court's analysis in *McMillan* and *Almendarez-Torres*, a statute of this type would fail constitutional scrutiny if the legislature "change[d] a pre-existing definition of a well-established crime" or gave other signs that it was attempting to " 'evade' the Constitution" by " 'restructuring' the elements of an offense." *Almendarez-Torres*, 118 S. Ct. at 1230, 1232 (citing *McMillan*, 477 U.S. at 89-90). Thus, the speculative scenario raised by respondent is not reason to reject the constitutionally compelled rule that a fact of an offense that raises the statutory maximum must be treated as an element of the offense. *See Patterson* v. *New York*, 432 U.S. 197, 211 (1977) (long-held rule that the prosecution must prove elements beyond a reasonable doubt while the burden of proving affirmative defenses may be placed on the defendant "did not lead to such abuses or to such wide-spread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required").

CONCLUSION

When petitioner was arraigned, he was advised by the court that the maximum sentence he faced on the carjacking count was 15 years. Petitioner proceeded through plea negotiations, trial preparation and jury trial relying on that advice, only to be sentenced to a term of 20 years for the carjacking, one-third more than stated by the court. For the reasons stated herein and in the Brief for Petitioner, the judgment of the Court of Appeals should be reversed and the case remanded for resentencing, with a maximum punishment of 15 years on the carjacking count.

Dated: August 18, 1998

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

NATHANIEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Anti Car Theft Act of 1992 (P.L. 102-519, 106 Stat. 3384 [Oct. 25, 1992]) created a new federal offense of armed carjacking (18 U.S.C. §2119) with enhanced penalties in the event that "serious bodily injury" (as defined in 18 U.S.C. §1365) or "death" results.

This Court granted certiorari limited to the following questions:

1. Do subsections (1)-(3) of 18 U.S.C. §2119 describe sentencing factors or elements of the offense?

2. If subsections (1)-(3) set forth sentencing factors, is the statute constitutional?

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Interest of *Amicus Curiae*

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "[e]nsure justice and due process for persons accused of crime ... [f]oster the integrity, independence and expertise of the criminal defense profession ... and [p]romote the proper and fair administration of justice." NACDL has almost 10,000 members nationwide -- along with 80 state and local affiliate organizations numbering 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared before this Court as *amicus curiae* on many occasions. *See, e.g., Stewart v. Martinez-Villareal*, 66 U.S.L.W. 4352 (1998); *Calderon v. Thompson*, 66 U.S.L.W. 4301 (1998); *Trest v. Cain*, 118 S.Ct. 478 (1997).[1]

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1 Both parties have consented to NACDL's appearance as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

Statement of the Case

Enacted on October 25, 1992, the Anti Car Theft Act of 1992 (P.L. 102-519, 106 Stat. 3384 [1992]) created a new federal offense of armed carjacking (18 U.S.C. §2119), which provided, in pertinent part:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation or attempts to do so, shall --
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury ... results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.[2]

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2 The statute has since been amended by the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322, 108 Stat. 1796 [1994]) by deleting the firearm possession provision and inserting in its place a specific intent element. In addition, it added the death penalty as an available sentence where death results under subsection (3). *See United States v. Arnold*, 126 F.3d 82, 85 (2d Cir. 1997); *id.* at 90 (Miner, J., dissenting), *cert. granted sub nom. Holloway v. United States*, 66 U.S.L.W. 3698 (U.S. April 27, 1998)(No. 97-7164). The instant case, however, was tried under the statute as originally enacted in 1992. *United States v. Oliver*, 60 F.3d 547, 551-54 (9th Cir. 1995).

The original Act made it a federal offense to take, or attempt to take, a motor vehicle "from the person or presence of another by force and violence or by intimidation." Federal jurisdiction lies where the carjacker possessed a firearm and took a vehicle that had "been transported, shipped, or received in interstate or foreign commerce" prior to the theft. 18 U.S.C. §2119. The legislation, as originally enacted, extended the maximum imprisonment of 15 years for armed carjacking to 25 years if "serious injury" occurs and up to life in prison if death results. 18 U.S.C. §§2119 (1), (2) & (3). (The 1994 amendments added the death penalty as an available sentence where death results under subsection (3)). The 1992 Act's other provisions double the maximum imprisonment for other auto theft crimes from five years to ten years, and also provides civil and criminal forfeiture sanction for other enumerated violations. It also provides a maximum 15 year sentence for operating a "chop shop" for stolen vehicles.[3]

Critical to this case are the sentencing specifications of subsections (1), (2) & (3) of §2119 -- *viz.* whether the specification of aggravated penalties over the base offense penalty of fifteen years (subsection 1), where "serious bodily injury" results (subsection 2)(twenty five years) or where death results (subsection 3)(life imprisonment) are properly construed

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3 A complete discussion of the legislative history of the original 1992 Act (with citations to draft bills, committee reports and the Congressional Record) may be found in F. Georgann Wing, *Putting The Brakes On Carjacking Or Accelerating It? The Anti Car Theft Act of 1992*, 28 U. Rich. L. Rev. 385 (1994); *see especially id.* at 422-29 (discussing §2119). The legislative history relevant to the 1994 amendments to §2119 is discussed in detail in Note (Michenfelder), *The Federal Carjacking Statute: To Be Or Not To Be? An Analysis Of The Propriety Of 18 U.S.C. §2119*, 39 St. Louis U. L.J. 1009 (1995); *see especially id.* at 1018-26 (discussing inherent flaws of 1992 Act as well as the potential double jeopardy consequences in the sentencing provisions of the original statute and the 1994 amendment)

as elements of the basic offense -- such that they must be formally pleaded by the government and proven at trial beyond a reasonable doubt (*see, e.g., In Re Winship*, 397 U.S. 358, 364 (1970)) or whether they are merely sentencing-enhancement provisions which are not properly elements of the crime. In that case, the "serious bodily injury" and death requirements need not be pleaded in the indictment, nor proven beyond a reasonable doubt at trial (nor, indeed, necessarily proven by evidence subject to cross-examination or admissible under the Federal Rules of Evidence). *See, e.g., Almendarez-Torres v. United States*, 118 S.Ct. 1219, 1223 (1998); *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986); FRE 1101(d)(3).

While the courts below found the factors of "serious bodily injury" or death to be mere sentence-enhancement provisions over and above the basic offense -- and perforce not subject to the same strict due process safeguards of pleading and proof required at trial -- careful scrutiny of the statutory text as well as the overall statutory structure analyzed in the context of the companion provisions with which it is placed in the federal criminal code (Chapter 103 of Title 18, United States Code)(§§2213-19) clearly indicate that "serious bodily injury" and death are properly viewed as substantive elements of armed carjacking and, as such, are subject to the same constitutional requirements of pleading and proof as are all core elements of criminal offenses as enacted by Congress. To the extent that Congress' intent is deemed unclear or should the contested provisions be deemed mere sentence enhancers, they are nonetheless unconstitutional under *Winship* and its progeny for attempting to evade constitutional prescriptions by classifying necessary elements of a criminal offense as mere sentencing provisions in order to evade the requisite high constitutional burden of proof beyond reasonable doubt.

SUMMARY OF ARGUMENT

1. The federal armed carjacking statute -- 18 U.S.C. §2119 -- provides a penalty of fifteen years imprisonment for the basic offense (subsection 1), which increases to twenty five years in the event of "serious bodily injury" (subsection 2) as well as life imprisonment in the event of death (subsection 3). The statutory language is ambiguous and provides no clear-cut guidance as to whether the bodily injury/death provisions are aggravating elements of the basic substantive offense -- which must be pleaded and proven at trial -- or are mere sentence-enhancers, which need not be the subject of proof at trial. The legislative history provides no assistance in clarifying the ambiguity of the statutory text. However, analogous criminal provisions within the same statutory chapter suggest that the provisions should be treated as aggravating elements of the basic statutory offenses, which must be pleaded and proven at trial.

2. The rule of lenity provides that all ambiguities with respect to the ambit of criminal statutes are to be resolved in favor of the accused. These include ambiguities with respect to penalties as well as the substantive context of penal statutes. That would be the appropriate course in this case, where Congressional intent cannot remotely be discerned.

3. In the event these aggravating factors are deemed sentence-enhancers, rather than elements of the offense, serious constitutional problems are presented where sentence-enhancement factors may be utilized to impose sentences in excess of the statutory maximum permissible for the base offense. In order to avoid potential constitutional problems, the aggravating factors should be construed as elements of the substantive offense of armed carjacking, not mere sentence-enhancement provisions.

ARGUMENT

I

THE REQUIREMENTS OF "SERIOUS BODILY INJURY" AND "DEATH" CONTAINED IN §§2119(2) & (3) ARE ELEMENTS OF THE UNDERLYING ARMED CARJACKING OFFENSE (§2119(1)), NOT MERE SENTENCE-ENHANCEMENT FACTORS, AND ARE THUS SUBJECT TO THE CONSTITUTIONAL REQUIREMENTS OF NOTICE IN THE INDICTMENT AND PROOF BEYOND REASONABLE DOUBT AT TRIAL

Analysis of Congress' federalization of the offense of armed carjacking indicates that it has created a statute in which the base offense -- carjacking of a vehicle in interstate commerce by force and violence or intimidation while in possession of a firearm -- is ordinarily subject to a penalty of fifteen years' imprisonment. 18 U.S.C. §2119(1). In the event that "serious bodily injury" results, the penalty rises to twenty five years' imprisonment. §2119(2). In the event of death, the penalty goes up to life imprisonment (since amended to include the option of death). §2119(3).

The crucial question here is one of Congressional intent and the constitutional implications of its decisions in setting forth the elements of penal statutes. Did Congress intend that the "serious bodily injury" and death provisions contained in subsections (2) and (3) of the statute to be (aggravating) substantive elements of the underlying armed carjacking offense (subsection (1)) -- in which case they would would required to be pleaded in the indictment and proven beyond reasonable doubt at trial -- or are they merely sentence-enhancement

factors, applicable only in the event of conviction of the underlying offense, in which case they need never be presented to the jury or subject to the standard of proof beyond reasonable doubt? *See Almendarez-Torres v. United States*, 118 S.Ct. 1219 (1998); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

The distinction is critical. An indictment must set forth each element of the crime charged. *Hamling v. United States*, 418 U.S. 87, 117 (1974). But an indictment need not set forth factors relevant only to the sentencing of an accused -- nor need it prove those factors beyond reasonable doubt at trial. *Almendarez-Torres*, 118 S.Ct. at 1223. Within limits (*McMillan*, 477 U.S. at 84-91), the question of which factors are which is normally a matter for Congress. *See Staples v. United States*, 511 U.S. 600, 604 (1994)(definition of a criminal offense entrusted to the legislature, "particularly in the case of federal crimes which are solely creatures of statute")(quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

Accordingly, in assessing the reach of a federal criminal statute, the Court must pay close heed to statutory language, legislative history and purpose in order strictly to determine the scope of conduct the act forbids. *Dowling v. United States*, 437 U.S. 207, 213 (1985). Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where a "narrow interpretation" is typically appropriate. *Id.* Thus, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that it clear and definite." *Id.* at 214 (quoting *Williams v. United States*, 458 U.S. 279, 290 (1982), quoting *United States v. Bass*, 404 U.S. 336, 347 (1971), quoting *United States v. C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)).

These interpretive rules are particularly apposite here, where the Court is construing the sentencing provisions of a penal statute, whose analysis must be informed by the "rule of lenity". *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978). In prior cases the Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. *United States v. Batchelder*, 442 U.S. 114, 121 (1979). As the rule was stated in *Ladner v. United States*, 358 U.S. 169, 178 (1958): "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *See also Whalen v. United States*, 445 U.S. 684, 695 n.10 (1980); *Bifulco*, 447 U.S. at 387; *Simpson*, 435 U.S. at 14-15.

As will become clear upon close analysis, the statutory text and structure of §§2119 (1), (2) & (3) is altogether ambiguous as to whether the "serious bodily injury" and death components were intended by Congress to be elements of the offense or mere sentence-enhancement factors. That fatal ambiguity is in no way clarified by consideration of the statute's legislative history, which deals with the new armed carjacking provision only in passing, devoting its principal attention to legislative efforts to outlaw illegal "chop shop" activities and to increase penalties for pre-existing auto theft crimes. As will be seen, the creation of an altogether new federal crime of armed carjacking was entirely peripheral to Congress' presumed "collective legislative intent" (as manifested in the printed committee reports and legislative markups).

Nevertheless, consideration of §2119 within the context of its placement in Chapter 103 of Title 18, United States Code

("Robbery and Burglary")(18 U.S.C. §§2211-19) suggests that whenever assault, physical injury or death are the incidental results of the underlying theft activities proscribed in that chapter -- *compare* §§2113(d) & (e) *with* §§2119(2) & (3) -- the assaultive or homicidal behavior is treated as an additional element of the underlying theft offense, which must be pleaded and proven at trial before it may be used as an enhanced penalty at sentencing. *See* E. Devitt, C. Blackmar, K. O'Malley, *Federal Jury Practice and Instructions* §49A.02 (1997 Supp.)("The carjacking statute has been patterned after the other federal robbery statutes (18 U.S.C.A. §§2111, 2113 and 2118)" and was enacted in 1992 to protect car owners from violent crime)(quoting H.R. Rep. No. 851(I), 102nd Cong., 2nd Sess. at 17, 1992 U.S.C.C.A.N. 2829, 2834).

A. The Statutory Text of §2119 and Its Legislative History

The statutory text of §2119(1)-(3), as well as its legislative history, provide no definitive guidance as to whether Congress intended "serious bodily injury" or death to serve as additional aggravating elements of the crime of armed carjacking or mere sentence-enhancement features that need not be pleaded or proven at trial.

In the first place, neither the statutory language itself nor its placement within the body of the text provides any clue as to Congress' intentions in this regard. *Compare McMillan*, 477 U.S. at 81 n.1. Nor have the serious bodily injury and death provisions been placed in a statutory subject-matter title expressly addressed to penalty or sentencing. *Compare* 18 U.S.C. §111. Nor, for that matter, does the statute set forth the elements of the offense and the penalties therefor in separate subsections. *Compare* 8 U.S.C. §1324(b)(iii).

Indeed, Congress has been singularly inconsistent in its

statutory draftsmanship as far as providing explicit indications whether the injury or death provisions are elements of the offense or sentence-enhancement factors. In some statutes, serious bodily injury is set forth in the definition of the crime. *Compare* 18 U.S.C. §1091. In other statutes, the injury factor is set forth in both the definition of the crime and repeated in the penalty provision. *Compare* 18 U.S.C. §1959. In still other statutes, the injury factor is set forth in subsections entitled "Penalties" (21 U.S.C. §841(b)), "Aggravated Offense" (18 U.S.C. §43(b)), or "Enhanced Penalties" (18 U.S.C. §111(b)). Thus, the structure of any particular federal statute -- including §2119 -- provides little consistent guidance as to whether in any particular statute, Congress intended the injury or death element to be part and parcel of the offense -- with all the attendant constitutional protections appertaining thereto -- or a mere sentence enhancer.

Nor is the legislative history any more informative on this specific point. With the Anti Car Theft Act of 1992, Congress hoped that the codification of a new federal crime of armed carjacking, new forfeiture remedies against auto thieves and increased penalties for pre-existing federal crimes related to auto theft would give federal law enforcement agencies greater greater flexibility in dealing with the growing national problem of auto theft. H.R. Rep. No. 102-851(I) at 16, 1992 U.S.C.C.A.N. at 2832. "The majority of the legislative history behind the Act's enactment, however, focuses on a comprehensive plan for taking the profit out of car theft rather than thoughtful reasoning behind the creation of the federal crime of 'armed carjacking'". Michenfelder, 39 St. Louis U. L.J. at 1015 & n.47.

In this respect, the Act devotes most of its attention to stopping three profiteering methods of auto theft wholly unrelated to armed carjacking. In particular, Congress

concerned itself primarily with improving the parts-marking program so that "chop shops" could be abolished, establishing a national system for recording title documents so that "title washing" could be prevented, and tightening Customs Service enforcement against stolen car exporters. 1992 U.S.C.C.A.N. at 2930-31; Wing, 28 U. Rich. L. Rev. at 410-22 (discussing background behind these provisions as well as the sparse mention of armed carjacking during the legislative debates).[4]

The legislative history, however, is otherwise silent with respect to the substantive or penalty provisions for the armed carjacking statute. The only mention of note consists of a simple reference to the fact that while the original bill (H.R. 4542) created a crime of armed carjacking with a sole penalty provision mandating 15 years in prison, the final legislation reported out by the conference committee had, without explanation, changed the penalties to those that are contained in the present statute: 15 years for the base offense; 25 years in the event of "serious bodily injury"; and life imprisonment in the event that death resulted. *See* Wing, 28 U. Rich. L. Rev. at 415-16, 422-28 (collecting citations from various bills and discussions in Congressional Record relevant to the carjacking provisions).

B. §2119 in the Context of Chapter 103, Title 18, U.S.C.

When Congress enacted the armed carjacking statute in 1992, it placed it within Chapter 103 of Title 18 of the United States Code, a chapter entitled "Robbery and Burglary". This

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4 In particular, the Act doubles the maximum imprisonment terms for other auto theft crimes from five years to ten years (18 U.S.C. §553(a); 18 U.S.C. §2312; and 18 U.S.C. §2313(a)) and provides civil and criminal forfeiture sanctions for enumerated violations (18 U.S.C. §§981(a)(1)(F), 981(a)(5) & 982 (a)(5)).

chapter deals with such offenses as "Bank robbery and incidental crimes" (18 U.S.C. §2113), "Mail, money or other property of United States" (§2114) and "Robbery and burglaries involving controlled substances" (§2118).

In each of the relevant statutes under Chapter 103, the principal elements relate to theft offenses. Significantly, however, where "assault", "serious" or "significant" bodily injury or "death" occurs incidental to the theft offense, each statute provides that injury or death is an aggravating element of the underlying theft offense, which must be pleaded and proven at trial, and for which harsher sentencing penalties are imposed over and above the original theft offense. *See, e.g., Simpson v. United States*, 435 U.S. 6, 14 (1978); *United States v. Gaddis*, 424 U.S. 544, 547-48 (1976); *Prince v. United States*, 352 U.S. 322, 325 (1957); *United States v. Grimes*, 607 F.2d 6, 12-14 (2d Cir. 1979); *United States v. Sappe*, 898 F.2d 878, 880-81 (2d Cir. 1990)(violations of simple bank robbery and aggravated bank robbery "did not constitute separate offenses but were simply variations of a single offense graded according to the existence and nature of aggravating circumstances"). *See also O'Clair v. United States*, 470 F.2d 1199, 1202 (1st Cir. 1972)("[i]t seems evident ... that Congress intended to create one offense, bank robbery, which was to receive one punishment, its severity determined by the nature of its accompanying aggravating circumstances"); *United States v. Willis*, 102 F.3d 1078, 1082 (10th Cir. 1996)(§2113[d], involving aggravated penalty where bank robbery included assault or placing life in jeopardy, is a substantive crime, not a mere sentence enhancement).

Comparison of §2119(1), (2) & (3) with the parallel provisions of its companion bank robbery statute (§2113(a), (b), (d) & (e)) is instructive in this regard. §2113(d) provides that whoever, in the course of committing bank robbery, assaults or

places in jeopardy the life of any person by use of a dangerous weapon, is subject to an aggravated penalty of twenty five years' imprisonment. Similarly, §2113(e) provides that where death or kidnapping occur during the course of the underlying bank robbery offense, the aggravated penalty rises to a mandatory minimum ten year sentence up to life imprisonment or death. *See Green v. United States*, 365 U.S. 301, 303 (1961)(§2113(a) is "the same offense [as §2113(d)] without the elements of aggravation"); *United States v. Evans*, 665 F.2d 54, 55 (2d Cir. 1981)("a conviction of the lesser, included offense of unarmed bank robbery, §2113(a), must be merged into a conviction of armed bank robbery, §2113(d), when both convictions arise from a single criminal act * * * In short, to violate §2113(d), a fortiori, an individual commits an offense under either subsection (a) or (b)").[5]

The same principles should apply to §2119. The basic core offense of armed carjacking calls for a base penalty of fifteen years imprisonment. §2119(1). Where the *aggravating* factor of "serious bodily injury" occurs incident to the base offense, the penalty rises to twenty five years. §2119(2). When death results, the penalty rises yet again to life imprisonment

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5 *See also* §2114(a)(assaulting any person in custody of mail or money of the United States in the course of theft carries ten year penalty; where person is wounded or life placed in jeopardy by use of dangerous weapon, penalty is twenty five years); §2118(c)(1) & (2)(assaulting or placing life in jeopardy during course of robbery calls for enhanced penalty of twenty five years; where death results, the penalty is any term of years up to life imprisonment).

Under each of these statutes, the assault, injury or death component is deemed an aggravating element of the basic theft offense, which must also be pleaded and proved at trial. *See Holiday v. Johnston*, 313 U.S. 342, 349 (1941)(the predecessor to the current statutes "does not create two separate crimes but prescribes alternative sentences for the same crime depending upon the manner of its perpetration").

(and, as recently amended, to death). §2119(3). Accordingly, much like the analogous bank robbery statute, the degree of punishment for armed carjacking rises to the extent either of two aggravating factors is proven -- serious bodily injury or death. Thus, much like greater and lesser included offenses, armed carjacking consists of one unitary offense whose punishment is based upon the presence (or absence) of two particular aggravating factors. *See Grimes*, 607 F.2d at 12-14.

That the aggravating factors in question -- serious bodily injury or death during the course of a carjacking -- relate to offense characteristics, rather than offender characteristics, further militates in favor of construing §2119 (2) & (3)'s aggravators as elements of the offense, rather than mere sentence enhancers. *See, e.g.*, Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 706-07, 719-24 & nn.183-203 (1983)("The most significant elements of an offense definition ... are the [attendant] circumstance and result elements * * * [result is a] circumstance changed by the actor"); *see also* 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* §3.11(e)(1986)(Concurrence of Mental Fault and Results -- Difference as to Degree of Harm).

Certainly, under recently-amended §2119(3), where the death penalty may now be imposed in the event that death occurs in the course of the underlying carjacking, it is axiomatic that proof of death having resulted is a critical and necessary element of the offense, which must be proven to, and found by, the jury beyond reasonable doubt. *See United States v. Edmonds*, 80 F.3d 810, 817 n.7 (3d Cir. 1996)(*en banc*)("Congress determines 'elements' and hence, what facts require unanimous jury agreement, every time it passes a criminal statute. For example, we would not allow a conviction to stand for murder under 18 U.S.C. §1111 without unanimous

agreement that someone was killed. Congress has made the unlawful killing of a human being an 'element' for which unanimity is required").

Accordingly, if death is a necessary element that must be proven beyond reasonable doubt under recently-amended §2119(3) before a death sentence may be imposed -- as undoubtedly it must -- Congress has certainly given no indication that it intended the "serious bodily injury" provision of subsection (2) to be treated any differently than the death provision of subsection (3). *See, e.g., United States v. Michael*, 10 F.3d 838, 842 (D.C. Cir. 1993)("we are reluctant to infer ... classification [as a penalty enhancement] in the absence of a reasonably clear statement from Congress, at least for a fact embedded in the statutory section defining the crime and closely related to the circumstances of the crime"); *United States v. Rezaq*, 134 F.3d 1121, 1136 (D.C. Cir. 1998)("The fact that a death resulted from a highjacking is 'closely related' to the circumstances of the highjacking; indeed, this fact will ordinarily be admissible at trial, to prove that defendant used force or intimidation in committing the crime. (Citation omitted). As to the statute's structure, we have found that Congress did not clearly demarcate factors related to guilt from those related to punishment in drafting [the statute. This] militates against the penalty-enhancement reading").

C. The Rule of Lenity in the Face of Congressional Ambiguity

Where we are faced with a criminal statute whose text is seriously ambiguous on its face as to whether the bodily injury/death factors are intended as elements of the offense or mere sentence enhancers -- and where the legislative history sheds no further light one way or the other on the question -- this Court must apply the rule of lenity to this penal statute and

resolve the ambiguity in petitioner's favor. *See Granderson v. United States*, 511 U.S. 39, 42-43 (1994)("[W]e rest on the principle that 'the Court will not interpret a federal criminal statute so as to increase the penalty ... when such an interpretation can be based on no more than a guess as to what Congress intended'")(quoting *Bifulco*, 447 U.S. at 387, and *Ladner*, 358 U.S. at 178); *see also Simpson*, 435 U.S. at 14-15.

Here, there can be no question as to the ambiguity of the statutory text. There is no clear demarcation between offense and penalty elements. Moreover, comparison of the carjacking statute with the inconsistent manner in which Congress has drafted the offense and penalty provisions of other penal statutes provides no clear and convincing guidance as to what it had on its collective mind in this case. Certainly, the legislative history provides no additional enlightenment as to Congress' intentions. To be sure, the rule of lenity may not be used to create an ambiguity where none exists on the face of the statutory text. *See United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992). Nonetheless, "[w]here it is doubtful whether the text includes the penalty, the penalty ought not to be imposed". *Id.* at 309 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in the judgment).

II

"SERIOUS BODILY INJURY" AND "DEATH" MUST BE PLEADED IN THE INDICTMENT AND PROVEN AT TRIAL BEFORE A SENTENCE IN EXCESS OF FIFTEEN YEARS MAY BE CONSTITUTIONALLY IMPOSED UNDER §2119

In the event that this Court concludes that "serious bodily injury" and "death" are not elements of the offense of

armed carjacking, but, rather, are mere sentence-enhancement factors which need not be pleaded or proven beyond reasonable doubt at trial, it then faces a serious constitutional conundrum -- whether, and to what extent, Congress may circumvent constitutional requirements of pleading and proof in the drafting and formulation of criminal statutes. *Compare Mullaney v. Wilbur*, 421 U.S. 684, 689 (1975) *with Patterson v. New York*, 432 U.S. 197 (1977).

In this case, §2119(1) sets forth a maximum sentence of fifteen years for the core offense of armed carjacking. In the event that "serious bodily injury" occurs during the course of the crime, a sentence of twenty five years may be imposed. §2119(2). In the event death results, the sentence may be life imprisonment (or, as recently amended, death). §2119(3). May Congress circumvent the due process clause by allowing courts to impose sentence that far exceed the statutory maximum allowed for the offense of conviction on the basis of additional crime-related (or offender-related) factors the government was not required to plead or prove at trial? Notwithstanding *McMillan v. Pennsylvania*, 477 U.S. at 86, the answer is still no.

While *McMillan* did not find constitutional fault with a state sentencing scheme which allowed for the consideration of offense-related factors not required to be proven at trial -- in that case, gun possession during the offense -- the Court nonetheless stopped short of endorsing sentence-enhancement that exceeded the statutory maximum permissible for the offense of conviction on the basis of factors not submitted to the jury or proven beyond reasonable doubt. 477 U.S. at 86-87. Within the statutory maximum provided by the legislature for the particular offense for which a defendant is convicted, this Court has given the sentencing courts broad discretion in the consideration of extrinsic offense-related and offender-related

information not presented during the course of the criminal trial. *See, e.g.*, Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 543-50 (1993); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. Rev. 1179, 1185, 1213-22 (1993).

Where the sentence imposed exceeds the statutory maximum permissible for the offense of conviction, however, due process concerns must inform the process. There are constitutional limits imposed on the ability of any legislature, including Congress, to circumvent the Constitution by declaring an offense-related fact to be treated as a mere sentence-enhancer which need not be pleaded or proven at trial and by which the sentence ultimately imposed may be far in excess of that of the offense of which the defendant was legally convicted. *See especially* Susan N. Herman, *The Tail That Wagged The Dog: Bifurcated Fact-Finding Under The Federal Sentencing Guidelines And The Limits Of Due Process*, 66 S.Cal. L. Rev. 289, 293, 316-41 (1992).

Here, if treated as sentence-enhancement factors, the serious bodily injury and death factors allow the trial court to impose sentences far in excess of the statutory maximum sentence permissible for the base offense -- fifteen years -- on the basis of evidence which need not be presented to the jury nor proven beyond reasonable doubt. Because these aggravating factors are never presented to the jury and full confrontation rights are dubious at sentencing, the defendant's right to procedural due process in the context of his sentencing is seriously compromised. *See Meachum v. Fano*, 427 U.S. 215 (1976); *Specht v. Patterson*, 386 U.S. 605 (1967).

In this case, treating the "serious bodily injury" factor as a mere sentence-enhancement device has allowed the sentencing court to impose a sentence ten years in excess of the maximum

sentence of the only offense of which he was found guilty beyond reasonable doubt -- simple carjacking. He received a sentence of twenty five years imprisonment under §2119(2) rather than the fifteen year maximum permissible under §2119(1) despite the fact that the prosecution was relieved of the obligation of proving serious bodily injury beyond reasonable doubt. To treat these aggravating factors as mere sentence-enhancers thus allows the courts to impose sentences far in excess of the statutory maximum permissible for the offense of conviction without the appropriate procedural protections to safeguard the accuracy of the process. Herman, 66 S.Cal. at 333-35.

Given the serious constitutional implications raised by allowing sentencing in excess of the statutory maximum, it is appropriate to return to first principles. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *Almendarez-Torres*, 118 S.Ct. at 1234 (Scalia, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting). In this case, declaring serious bodily injury and death to be elements of the offense -- much like the analogous bank robbery statutes -- rather than mere sentence-enhancers, would neatly avoid the controversy.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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